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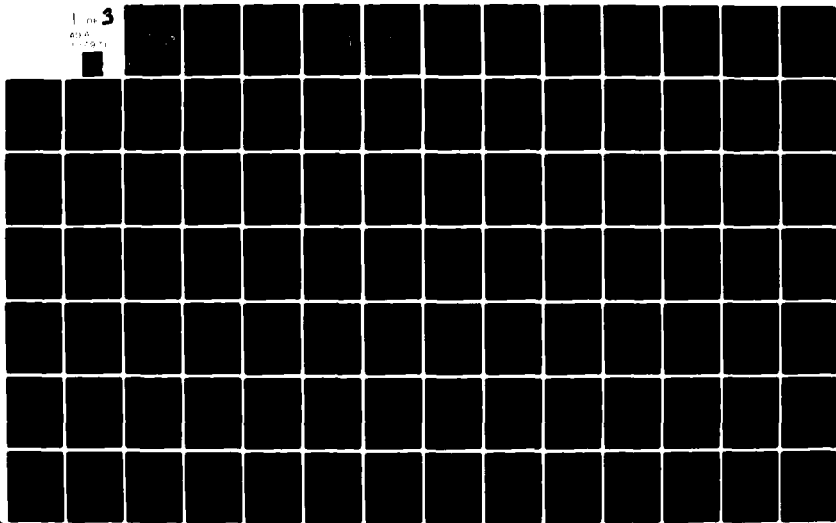
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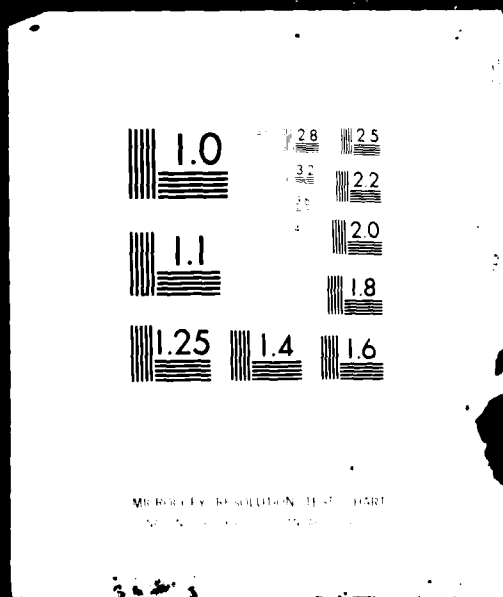
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ABSTRACT
DISCLOSURE OF FEDERAL ACQUISITION RECORDS

The thesis applies the Freedom of Information Act, 5 USC 552, to the documents generated by the Government acquisition process. The mandate of the Act is to open Government records to the public. With this congressional policy as the general rule, the thesis focuses on the exceptions. The threshold issue is whether a document is subject to the Act. Variables such as the form, ownership, possession, and contents of documents are examined. Once a document is properly characterized as a Government record, and subject to the Act, the focus shifts to statutory exemptions from mandatory disclosure. The Act provides for nine exemptions. The thesis examines the four exemptions which have the largest impact on Federal acquisition records: national security, express statutory exemptions, business records, and internal memoranda. These represent the first, third, fourth, and fifth exemptions of the Act, respectively. Exemption one is concerned with material classified in the interests of national security. Portions of acquisition records may be properly protected from disclosure under this rationale. Exemption three is concerned with documents for which Congress has provided an express statutory exemption. In the acquisition arena, the Trade Secrets Act, 18 USC 1905, is the most prominent statute which arguably exempts records from disclosure. Exemption four is concerned with protecting from disclosure trade secrets and commercial or financial data. This exemption is relied on heavily by contractors who have submitted documents deemed sensitive to the Government. Generally, contractors must be likely to suffer substantial competitive harm from the disclosure of their data before protection may be found under this exemption. The final exemption considered, exemption five, is concerned with the Government's internal memoranda. This is the exemption the Government relies upon to protect deliberative (as opposed to factual) and pre-decisional (as opposed to post-decisional) material. The thesis concludes with a discussion of numerous procedural issues that arise at both the agency stage of a request for records, and also at the judicial stage when a requester or submitter of records seeks legal review of an agency decision to either withhold or disclose requested documents.

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Disclosure Of Federal Acquisition Records

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DISCLOSURE OF FEDERAL ACQUISITION RECORDS

Disclosure of Federal Acquisition Records

by

Royle Pruitt Carrington, III

B.S. cum laude August 1966, University of Wyoming
M.A. December 1967, Michigan State University
J.D. cum laude May 1976, Baylor University

A Thesis submitted to
The Faculty of
The National Law Center
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May 24, 1981

Thesis directed by
Ralph Clarke Nash, Jr.
Professor of Law

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PREFACE

The writer wishes to express his appreciation to Professor Ralph Nash, for guidance and advice; to Mr. Ted Prahinski and Mr. Ed Carter of Air Force Systems Command, for ideas and information; and to Ms. Kathleen Carrington, for editing and typing the manuscript.

Views expressed by the writer in this thesis are his own, and do not necessarily represent those of any firm, agency, or other organization, governmental or nongovernmental, with which he is, has been, or will be associated.

INTRODUCTION

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits.¹

President Lyndon B. Johnson, July 4, 1966

Legislation aimed at opening federal records to public scrutiny was enacted over three decades ago. Section 3 of the Administrative Procedure Act of 1946² was "drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance."³ This sentiment was implemented by broad, undefined loopholes. For example, information was to be made available under the Act unless the "public interest" required secrecy, or "good cause" dictated confidentiality. Needless to say, "public interest" or "good cause" could easily be conjured to prevent disclosure. Furthermore, disclosable information was limited to "official records," requesters were required to demonstrate a legitimate interest in the desired records, and judicial review was nonexistent.⁴

Congressional critics were blunt in their evaluation of this early attempt at implementing a freer information disclosure policy:

It is the conclusion of the committee that the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Indeed, it has had precisely the opposite effect; it is cited as statutory authority for the withholding of virtually any piece of information that an official or any agency does not wish to disclose.⁵

The Freedom of Information Act was signed by President Johnson on July 4, 1966.⁶ After a decade of committee hearings and investigations, and several legislative attempts,⁷ the ultimately successful bill was virtually unopposed in the legislative branch of government, and unanimously opposed by the executive branch.⁸ The Information Act became effective July 4, 1967. The new Act substituted nine specific exemptions⁹ from disclosure for the broad criteria of the 1946 Act. Furthermore, the new Act removed the necessity to demonstrate a valid interest in the requested records,¹⁰ and provided for de novo judicial review of agency decisions.¹¹

The uniform opposition of federal agencies to the new Act presaged significant problems in its implementation. In the summer of 1969 Mr. Ralph Nader launched a hundred students on an investigation of agency compliance with the Information Act. His conclusion was predictable:

(G)overnment officials at all levels in many of these agencies have systematically and routinely violated both the purpose and specific provisions of the law Thus the Act, designed to provide citizens with tools of disclosure, has been forged into a shield against citizen access.¹²

Mr. Nader perceived narrow statutory exemptions from disclosure being broadened by agencies,¹³ the commingling of releasable information with that exempted from disclosure, unnecessary delays in responding to requests, and even inexplicable disappearances of records from agencies.¹⁴ Congress shared the same perception and overrode a presidential veto in 1974 with legislation designed to demand compliance with the Information Act. The 1974 Amendments provide for initial agency responses to requests for records within ten workdays and decisions on administrative appeals within twenty workdays, absent unusual circumstances.¹⁵ The Amendments further provide that nonexempt segregable portions of exempt records must be disclosed,¹⁶ limit agency charges for filling requests,¹⁷ provide for attorney's fees and litigation costs when a requester substantially prevails in court against an agency,¹⁸ disciplinary

action for agency personnel who arbitrarily or capriciously withhold records,¹⁹ and punishment for contempt of those agency personnel who fail to comply with a court order to disclose.²⁰ These procedural changes removed any lingering doubts as to the congressional position on the open records issue, and served to draw the battle lines with agencies which found the new administrative burdens onerous. Mr. Nader was unsympathetic with the agencies:

It is important to remember that the executive branch made the bed in which it now finds itself. Congress did not enact the 1974 amendments willy-nilly or in a fit of anti-executive emotion, but only after the rights guaranteed under the 1966 act had been systematically denied for eight long years, and a careful, complete record of the abuses of the 1966 act had been compiled.²¹

Federal contractors will be forgiven if in the early years of the new Information Act they believed that the principal thrust of the legislation was aimed at other than the acquisition process. The rhetoric accompanying the crusade for passage of the new Act depicted a death struggle between Democracy and Bureaucratic Secrecy. The Los Angeles Times's portrait was typical:

A battle most Americans thought was won when the United States was founded is just now moving into its final stage in Congress. It involves the right of Americans to know what their Government is up to. It's a battle against secrecy, locked files and papers stamped "not for public inspection."²²

In a similar vein, the Honolulu Star Bulletin editorialized:

What is demanded is not the right to snoop. What is demanded is the people's right to know what goes on in the government that rules them with their consent.

All sorts of evils can hide in the shadows of government secrecy. History has confirmed time and again that when the spotlight is turned on wrongdoing in public life, the people are quick to react.²³

The federal contractor will generally endorse this sentiment which represented the cutting edge of the crusade for the new Information Act. One could believe that the new Act was designed to obtain the release of records on Alger Hiss and Julius and Ethel Rosenberg,²⁴ the tiger cages of the Republic of Vietnam,²⁵ and the Federal Bureau of Investigation's domestic surveillance activities.²⁶

Indeed, civil rights activists have alleged that one FBI response to the amended Information Act is acceleration of the destruction of records which document surreptitious entry and surveillance activity.²⁷

However, there were early intimations that the new Information Act would ultimately reach federal contractors and the acquisition process. For example, prior to enactment, Congressman John Moss noted that

(T)he policies and regulations concerning the release of unclassified information on these Government contracts have not yet matured to the point where the public is given the information needed in order to know and understand why selections are made, how much money is spent, and what is being purchased by our tax dollars.²⁸

Congressman Moss's concern was exemplified by Project Mohole, a multimillion dollar negotiated contract involving a geological effort to drill the ocean floor. In 1962 the National Science Foundation determined that it would not be in the public interest to release the cost estimates submitted by unsuccessful offerors.²⁹ The successful contractor had not submitted the low offer. The resulting furor caused President John F. Kennedy to intervene and order disclosure.³⁰ Thus, the acquisition function was not wholly forgotten by supporters of the new Information Act.

The federal government collects vast amounts of business data both in its regulatory function and in its acquisition function. Records generated by the latter process will be the principal focus of this thesis. Thus, the open records issues affecting procuring agencies such as the Department of Defense and the General Services Administration will be examined, though reference will also be made to court decisions and policies of principally regulatory agencies such as the Food and Drug Administration and the Federal Trade Commission. Records generated by the acquisition process include documents associated with acquisition planning, the solicitation and evaluation of proposals, contract negotiation and award, and contract administration.

The Information Act designates selected records for publication and indexing in the Federal Register. Other records are not required to be published, but must still be indexed and requesters provided access and copies. A final category of records need not be published or indexed, but requesters must be afforded access and copies. Published and indexed records include descriptions of organizations, information disclosure procedures, agency functions and decision-making procedures, rules of procedure, substantive rules of general applicability, and statements of general policy or interpretations of general applicability.³¹ Unpublished but indexed records include final opinions in adjudicative cases, statements of policy and interpretations of less than general applicability, and administrative staff manuals and instructions affecting the public.³² Records of the federal acquisition process generally fall in the final category of unpublished, unindexed records. Requesters of such records are to be provided prompt access and copies so long as the desired records are reasonably described and published agency information procedures are followed.³³

The substantive decision to honor or deny a request for agency records is not always received with equanimity by either requesters or submitters of information. Given the huge volume of requests and the wide decentralization of the authority to release documents, there will inevitably be some questionable disclosure decisions. It is not always clear why different disclosure decisions on the same or similar records are made by different agencies, or by different offices of an agency, or at different points in time by the same agency. However, caution is in order in the evaluation of disclosure decisions. Given the same fact situation, reasonable persons may indeed provide differing responses. It is easy to fall into the trap exemplified by the litany, "My disclosure decisions are fair and reasonable, yours are questionable, and theirs are arbitrary and capricious." Equally

important, facially similar types of material may be found in differing factual situations which warrant differing disclosure responses.

The Government Information and Individual Rights Subcommittee of the House Committee on Government Operations recently conducted a study of Information Act requests for business data. Some of the causes of disclosure decisions perceived to be questionable were identified as including the "failure to consider all relevant confidentiality arguments, misinterpretations or misunderstanding of the applicable law, abuse of discretion, and shortcomings in the scope of the exemption.³⁴ These causative factors will be considered in subsequent chapters of this thesis.

The first five chapters center on pertinent questions asked by agencies upon receipt of a request for federal acquisition records:

- Chapter One - Is the requested document an agency record?
- Chapter Two - Is the requested document exempt from mandatory disclosure by reason of the national security?
- Chapter Three - Do statutes other than the Information Act forbid disclosure of the requested document?
- Chapter Four - Is the requested document exempt from mandatory disclosure as a business record?
- Chapter Five - Is the requested document exempt from mandatory disclosure as an agency memorandum?

The thesis concludes, in Chapter Six, with procedural issues at both the agency and judicial levels. The substantive Information Act considerations deemed most important in the federal acquisition process are whether a document is an agency record subject to the Information Act, and exemptions one (national security), three (nondisclosure statutes), four (business records) and five (agency memoranda). That is not to say that the remaining statutory exemptions from disclosure are of little significance, since important issues have arisen concerning exemptions two (internal personnel rules and practices), six (personnel, medical and similar files), seven (law enforcement records), eight

(records of financial institutions), and nine (information concerning wells). Nevertheless, this latter group of exemptions has been employed with less frequency in the treatment of federal acquisition records.

The federal acquisition records at issue are many and varied. In roughly the chronological order of the acquisition process, the following types of documents exemplify those with which this thesis is concerned: acquisition plans, including government requirements, estimated costs, proposed sources, authority for negotiation, and project approvals and funding; requests for proposals; cost and technical proposals, both solicited and unsolicited, selected for award and rejected; evaluation, negotiation, and source selection data, including evaluation factors and weights, evaluation scores, cost and technical inputs to the source selection authority, audits of cost or pricing data, records of oral or written discussions, initial and best and final offers, pre-award surveys and other responsibility data, and price negotiation memoranda; contract documents including the statement of work; contract administration, such as inspection reports, audits, invoices, invention disclosures, engineering change proposals, and claims; and acquired products in document form, including raw data and final technical reports.

CHAPTER ONE

DOCUMENT STATUS AS AN AGENCY RECORD

One of the by-products of government is the creation of vast amounts of paperwork. There is so much paperwork being generated that a Commission on Federal Paperwork was created, presumably to reduce its domain. Paperwork "tales" are legion. For example, in the regulatory arena, the chairman of Eli Lilly informed the Commission on Federal Paperwork that the company prepares 27,000 government forms or reports each year, and that paperwork associated with one new drug contained over 200,000 pages and weighed a ton.³⁵ In the acquisition area, a request by Bell Helicopter Textron Corporation for the final contract on the Army's advanced attack helicopter reportedly sent the successful offeror, Hughes Helicopters, through some twenty-five volumes related to the contract in a search for proprietary data.³⁶ Then there are Navy contracting officers who will swear that no battleship is ever ready for delivery until the acquisition's paperwork rivals the ship's displacement. Three issues have arisen in the classification of all this paperwork as agency records. The issues are concerned with the form an agency record must take, the ownership and possession of a document, and document content.

The Form of Agency Records

The Information Act works its will on "agency records." Thus, after the object of a request has been identified, but prior to determining whether any exemptions from disclosure are applicable, the threshold consideration is the entity's status as an agency record. Noting that the Information Act is silent as to just what constitutes an agency record, the Attorney General's

1967 Memorandum³⁷ turned to the definition employed in federal records disposal.³⁸ The successor language, only slightly modified, includes as records:

(A)11 books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.³⁹

The Attorney General's 1967 Memorandum reasons that since requesters possess a statutory right to copies of records, the term could not include "objects or articles such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment, etc. . . ." ⁴⁰ This early effort at defining "records" has been generally adopted by agencies.⁴¹

The seminal judicial effort to define the term "records" was undertaken by a federal district court in Nichols v. United States.⁴² A Kansas pathologist desired to examine and test mostly physical evidence from the Kennedy assassination. The court, searching for illumination of the term "records," examined General Services Administration regulations, the Attorney General's 1967 Memorandum, a treatise on evidence, two lay dictionaries, a legal finding aid, and one court decision.⁴³ Without placing a stamp of approval on any of the definitions surveyed, it was clear to the court that the physical evidence did not pass muster. Rejected as records were a rifle, bullet fragments, a coat and shirt, and histological preparations.⁴⁴ Only the written diagnosis of a radiologist was deemed a record.⁴⁵

The federal district court in Save the Dolphins v. United States Department of Commerce⁴⁶ noted that "(t)he term 'records' in common parlance includes various means of storing information for future reference" and

concluded that there "does not appear to be any good reason for limiting 'records' as used in the Act to written documents."⁴⁷ Thus, the court found a motion picture film to be a record. Computer tapes have also been found to be records.⁴⁸ Generally, the federal acquisition process employs documents which are in the proper "form" to be denominated "records."

Document Ownership and Possession

Once the requested entity is determined to be in the proper form for a record, it is then necessary to consider whether it has become the record of a federal agency. This issue arises when a document has not been internally generated by a federal agency. Two fact situations will illustrate the differing treatment of records under the Information Act. In the first situation, described in the following section, the record is in an agency's possession; in the second situation the record is not in an agency's possession.

Records In An Agency's Possession

Under what circumstances may a record be in the hands of a federal agency, yet not be an agency record for purposes of the Information Act? The first case to address this issue, Cook v. Willingham,⁴⁹ is now over a decade old. In Cook the Tenth Circuit Court of Appeals held that a presentencing report in the possession of an executive agency was not an agency record. The court noted that the report in question was created for the use of a court, that the report remained in the exclusive control of a court, and that the Information Act does not apply to courts.⁵⁰ Mere use of the report by an executive agency was insufficient to transform it into an agency report. More recently, in Warth v. Department of Justice,⁵¹ the Ninth Circuit Court of Appeals considered whether a copy of a trial transcript in the possession of an executive agency was an agency record. The court followed the Tenth Circuit's

lead in Cook. As in Cook, the requester pointed to possession and use of the transcript by a federal agency, and argued that a court document may also be an agency record subject to the Information Act.⁵² The court was unpersuaded, finding instead that a trial transcript is created by and for a court; that if mere agency possession created an agency record, "the Act would encroach upon the authority of the courts to control the dissemination of its documents"⁵³; and that Congress intended that such authority would not be encroached upon by exempting courts from the Act. The court also cited with approval the District of Columbia Circuit's consideration of the same issue in Goland v. Central Intelligence Agency.⁵⁴

In Goland the requested document was the transcript of congressional hearings on the CIA conducted in 1947.⁵⁵ The requesters argued that agency possession of a document per se renders it an agency record, drawing upon the Attorney General's 1967 Memorandum for the proposition that "'(R)ecords' include all . . . papers . . . made or received by an agency of the United States Government . . . appropriate for preservation by that agency."⁵⁶ The court declared the definition appropriate for management and disposal of documents, but not for determining which records are subject to the Information Act.⁵⁷ In declaring that the requested document was not an agency record, the court was persuaded by the fact that the transcript of congressional hearings was a congressional document, by the evidence of congressional intent to maintain control over the document through its creation in executive session and the "Secret" classification imposed by Congress, and by Congress being expressly exempted from the operation of the Information Act.⁵⁸ From a policy standpoint, if possession of congressional documents by an executive agency forces disclosure, then Congress must choose between not disseminating a document which may prove useful to an executive agency, or forfeiting its prerogative of maintaining secrecy in its documents.⁵⁹

Thus, the court declared that mere agency possession of a document, without more, does not vest the document with agency record status. The test is "whether under all the facts of the case the document has passed from the control of Congress and become property of the agency with which the document resides."⁶⁰ Under the facts of Goland, the CIA was not free to dispose of the requested document, but held it as a "trustee" for Congress.⁶¹

Do the Cook, Warth, and Goland opinions hold any promise of relief for private submitters of documents to federal agencies? The issue became a brief footnote in Committee on Masonic Homes v. National Labor Relations Board.⁶²

The question in Masonic Homes was whether an employer, using the Information Act, may obtain copies of union cards submitted to the NLRB in support of a union petition for a representation election. The court considered "whether, indeed, the cards are government records. 'Records' are not defined in the Act, and there is plausible argument that the cards are union property merely in the temporary possession of the NLRB."⁶³ The "plausible argument" was not pursued and the court ultimately withheld the union cards under exemption six.⁶⁴ However, even if the court in Masonic Homes had determined that union property (the union cards) in the temporary possession of the NLRB were not agency records, it believed that agency records could be created by merely making a list of those employees who had signed a union card or even by photostating the union cards.⁶⁵ It is doubtful that the presentencing report in Cook, trial transcript in Warth and hearing transcript in Goland would not be declared agency records, while a mere copy of each would take on life of its own to become agency records. Such a view is tantamount to release of the original document and serves to undermine the policy reasons outlined above for preserving the documents as congressional or court materials.

There is ample warrant for caution on the part of private submitters contemplating reliance on Cook, Warth, and Goland. As a result, corporations

have been advised to establish "loan arrangements" for documents tendered to federal agencies whenever possible.⁶⁶ Furthermore, private submitters should not be lulled by language of "restricted use" found, for example, in military acquisition regulations. Offerors may restrict solicited and unsolicited proposals to all Department of Defense components with the following legend:

This data . . . shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposals; provided, that if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract . . .⁶⁷

Unsolicited proposals submitted to the Defense Department may also have the following cover sheet placed on them:

All Government personnel handling the proposal shall exercise EXTREME CARE to insure that the information contained herein is NOT DISCLOSED outside the Government and is NOT DUPLICATED, USED, OR DISCLOSED in whole or in part for any purpose other than to evaluate the proposal, without the written permission of the offeror (except that if a contract is awarded on the basis of this proposal, the terms of the contract shall control disclosure and use).⁶⁸

It might be argued that a privately produced document, exclusively controlled and only temporarily provided to a federal agency under a loan arrangement or stamped with a restricted use legend, invokes the principle of Cook, Warth, and Goland outlined above. However, Judge Bazelon, dissenting in Goland, reminded the majority that "federal agencies regularly receive documents created by non-agencies that obviously become 'agency records' in the ordinary course."⁶⁹ Furthermore, within two months of deciding Goland, the District of Columbia Circuit rendered its opinion in Forsham v. Califano.⁷⁰ The Forsham decision will be considered at length in the next subsection, but the court's dictum on the records of private submitters in the hands of federal agencies is noteworthy:

Scientists engaged in research on federal grants must accept the fact that any documents filed with the federal government, whether on the scientists' own initiative or an audit or other lawful demand, are subject to FOIA.

(R)ecords that are examined by the government through audit rights may become agency records under FOIA--if, for example, the records are copied by the agency or come into its possession.⁷¹

For policy reasons, agency possession alone may be insufficient to vest congressional or court materials with agency record status. However, private submitters do not enjoy the same express exemption from the Information Act, and probably operate under a possession per se test for agency records. Restricted use legends will not subordinate the Information Act. Such markings are useful to identify material submitters deem sensitive, but do not of themselves create exemptions from disclosure. All submitter-generated federal acquisition records which are in an agency's possession will generally be deemed agency records subject to the Information Act.

Records Not In An Agency's Possession

Under what circumstances may a record not be in the hands of a federal agency, yet be an agency record for purposes of the Information Act? Clearly, attempts to circumvent the Information Act by transferring agency records to a warehouse or similar bailee will not be sanctioned.⁷²

A different fact situation is presented when documents are created by Government contract or grant, but not delivered to the sponsoring agency. The leading case in this area is Forsham v. Califano,⁷³ which involved research into the treatment of diabetes under some 1,800 federal grants.⁷⁴ Over one thousand diabetic patients were monitored for five to eight years, generating some 55 million forms and patient charts.⁷⁵ One conclusion drawn from the research was that the mortality rate was significantly higher in patients treated with a certain type of drug. Thus the Food and Drug Administration proposed labeling changes in a certain drug to warn of the increased risks.⁷⁶ The requesters in Forsham were physicians who treat diabetic patients and who believed this particular study conclusion to be suspect. The raw research

data (forms and patient charts) were requested under the Information Act. A small portion of the data had been audited by the FDA and this raw data was released to the requesters. However, the FDA had never had the remaining mass of data in its possession and had no intention of securing possession of it.⁷⁷ Requesters argued that the raw data constituted agency records as a result of governmental involvement in the form of funding the study, agency access rights to the data, and agency reliance on the data and study findings.⁷⁸ The court perceived the requester's position as demanding, in effect, that the government exercise its contract right of access to bring the raw data under the Information Act.⁷⁹ Rejecting the necessity to create agency records by contract demand, the court provided the test to be employed:

The governing principle is that only if a federal agency has created or obtained a record (or has a duty to obtain the record) in the course of doing its work, is there an agency record that can be demanded under FOIA.⁸⁰

Where records are created by a private entity, we believe the applicability of FOIA will turn on whether the government is involved in the core planning or execution of the program, or whether, by contrast, the entity retains its private character in bona fide fashion during the course of the endeavor that results in the records.⁸¹

Thus, privately generated records which retain their private character become agency records only if such documents or copies come into an agency's possession.⁸² Loss of the "private character" of records stems from detailed control over operations which generate the records, a factor found absent in Forsham.⁸³ The Forsham decision follows the path blazed earlier by a federal district court in Ciba-Geigy Corporation v. Mathews.⁸⁴ The very same raw data at issue in Forsham were sought in Ciba-Geigy. That court declined to label the documents agency records. To be agency records, the court required proof that "the records were either Government-owned or subject to substantial Government control or use. In other words, it must appear that there was significant Government involvement with the records themselves" ⁸⁵

"Subject to control or use" may seem similar to those "access rights" argued by the requesters in both Ciba-Geigy and Forsham as warranting disclosure. In fact, Judge Bazelon, who wrote a strong dissent in Forsham, had no quarrel with the test in Ciba-Geigy.⁸⁶ However, the court in Ciba-Geigy clarified its test by requiring more than the mere existence of access rights, though such rights may be substantial. The access rights must be used "to exercise regular dominion and control over the raw data."⁸⁷ Thus the tests in Ciba-Geigy and Forsham, while characterized differently, appear to be essentially the same.

The dictum in Forsham is of some importance to records of the federal acquisition process. Private records or copies of records in agency possession are agency records subject to the Information Act. Had the raw data in Forsham come into agency possession, then whether or not the government was involved in the "core planning or execution" of the study would have been mooted, since the raw data would have become agency records. Corporations are occasionally advised that records which are shown to agency representatives on corporate premises, and not removed from those premises, may remain private records.⁸⁸ Thus, private records subject to government audit and technical data generated through government grants and contracts may avoid becoming agency records if agency possession can be avoided. To the extent such disclosure is adequate for government needs the maneuver may avoid the reach of the Information Act.

Document Content

Except for congressional or court material, under what circumstances may a document be in the proper form, and in an agency's possession, yet not be an agency record subject to the Information Act? One possibility is a document constituting "valuable property" which is not preserved for its

"informational" value. The Attorney General's 1967 Memorandum first broached this concept in the final paragraph of its discussion of exemption four (business records):

An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that the Congress intended . . . to give away such property to every citizen or alien who is willing to pay the price of making a copy.⁸⁹

The Memorandum suggested that such records be withheld under exemption four. In contrast, a 1975 Department of Defense Directive considered the issue to be one involving the definition of agency records:

Records include all books, papers, maps, photographs, or other documentary material . . . preserved . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.⁹⁰

Formulae, designs, drawings, research data, computer programs, technical data packages, and so forth, are not considered "records" within the congressional intent of . . . (5 U.S.C. 552). Because of development costs, utilization, or value, these items are considered exploitable resources to be utilized in the best interest of all the public and not preserved for informational value nor as evidence of agency functions.⁹¹

The "valuable property" concept is based on the fact that some data is developed only at tremendous cost and retains that value for a period after its acquisition. The concept does not enjoy wide acceptance. In spite of the lead of the DOD Directive, even the military departments are divided on the issue. The Air Force and Navy have embraced the concept of "valuable property" distinct from agency records, but the Army concedes the "records" issue and uses exemption four to justify nondisclosure.⁹²

Other agencies and commentators have either ignored the concept or endorsed the philosophy of an early Information Act case, Consumers Union of United States, Inc. v. Veterans Administration.⁹³ In Consumers Union the requested documents were results of the VA's hearing aid testing program.

Some \$67,900 had been expended on testing and consulting fees by the VA. The federal district court rejected the contention that the test results were valuable property which should not be disclosed for the price of reproduction: "This contention flies in the face of the general disclosure provision of the Act and suggests, as the VA did explicitly, that the government owes no more duty to its citizens than does a private non-profit corporation."⁹⁴

In a recent District of Columbia District Court case, Siemens v. Department of Defense,⁹⁵ the valuable property concept was again raised. The case was settled prior to judgment, but the fact situation illustrates the issue. The case dealt with a request for numerous documents concerning electron beam lithography, an advanced technology with both military and commercial applications. The documents included nine Air Force and Navy technical reports developed at a cost in excess of \$900,000. A magistrate was assigned by the district judge to make recommended findings of fact and conclusions of law. The magistrate's initial reaction was not favorable to the government's position. In an order proposing to deny cross motions for summary judgment the magistrate noted that

The documents at issue are both in the control of the agencies and are the agencies' property. The documents are reports produced pursuant to government contracts which have been submitted to and retained by the agencies involved. See Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). The Court concludes that these documents are agency records and are subject to the FOIA.⁹⁶

The Information Act provides that:

(E)ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.⁹⁷

"Agency records" are not defined in the Act. One issue is whether a restricted agency definition distinguishing "valuable property" from "informational material" is permissible under the Act or whether a broad, unrestricted definition is mandated. As the District of Columbia Circuit noted in

Washington Research Project, Inc. v. Department of Health, Education and Welfare on another issue, an obligation may be inferred from the Information Act "to publish rules that accurately reflect the agency's substantive obligations under the Act, and rules that fail to do so are of no force"98 Is a definition of "agency records" which excludes "valuable property" consistent with the Information Act or a denial of the Act's philosophy of disclosure?

It may be argued that "formulae, designs, drawings, research data, computer programs, and technical data packages" were not the types of information the Information Act was designed to disclose. The legislative history of the Act reveals that the Senate thought the "public has a right to know what its Government is doing."⁹⁹ The House was similarly concerned with an individual's right to "find out how his Government is operating."¹⁰⁰ As a result, the Information Act specified that rules of procedures and descriptions of organization will be published;¹⁰¹ that opinions, including concurring and dissenting opinions, and staff manuals that affect the public will be indexed and made available for inspection;¹⁰² and that voting in agency proceedings shall be recorded and made publicly available.¹⁰³ An examination of information abuses which the Information Act was supposed to correct provided no indication that disclosure of technical data or other such valuable property was the object of the Act.¹⁰⁴ The chronicled "abuses" which spurred enactment of the Information Act included a failure to publish agency rules, description of organization, and method of operation; a refusal to disclose the names and salaries of federal employees; the failure of some regulatory boards and commissions to open their meetings, make public their voting, and publicize the views of dissenters; and a refusal to disclose cost estimates submitted by unsuccessful offerors on a multimillion dollar contract.¹⁰⁵ The last mentioned "abuse" concerned Project Mohole, first

mentioned in the Introduction of this thesis.¹⁰⁶ The distinction between "valuable property" in document form and "informational" records was illustrated by an early commentator using Project Mohole as an example:

It is one thing to request the cost estimates on Project Mohole to determine whether a particular contract has been awarded properly and quite a different matter to claim that the results of that \$35 million effort can be made available for the price of reproduction.¹⁰⁷

Congressman John Moss, one of the principals in obtaining passage of the Information Act, was concerned that "the public (be) given the information needed in order to know and understand why selections are made, how much money is being spent, and what is being purchased for our tax dollars."¹⁰⁸ Thus, the Information Act's legislative history, the abuses the Act was designed to correct, and the types of records specified in the Act itself suggest that the documents Congress was concerned with were those that dealt with "organization, functions, policies, decisions, procedures, and operations"¹⁰⁹ and not documents recording formulae, designs, drawings, research data, computer programs, and technical data packages.¹¹⁰

Even the federal district court in the Consumers Union case,¹¹¹ after rejecting the contention that the VA's hearing aid test results should be withheld from disclosure as valuable property, went on to note that "(t)he contention may have merit with respect to formulae, designs, and drawings which the Attorney General's Memorandum was referring to; where ideas are inscribed on paper the papers may not be 'records'."¹¹²

In a more recent case, SDC Development Corporation v. Mathews,¹¹³ a medical reference library stored in a computer data bank was requested. Since the medical reports were available elsewhere, the true value of the requested material lay in the accumulation, organization, and abstraction of the reports, and in the computerized retrieval system.¹¹⁴ The computer tapes could be obtained through the National Technical Information Service for \$50,000; the

requester tendered \$500 under the Information Act to cover the cost of reproduction.¹¹⁵ The court properly denied the requested material since the medical reports were not only freely available in medical and scientific journals but the National Library of Medicine Act¹¹⁶ authorizes recoupment of reference library costs through appropriate user fees as opposed to the nominal fees contemplated by the Information Act.¹¹⁷ The computer tape system at issue in SDC Development Corporation is not the type of "valuable property" contemplated in the definition of "agency records" employed by the Air Force and the Navy. However, the Ninth Circuit's exercise in denying the Information request is instructive. The court examined the Information Act's legislative history and found that the records it was designed to protect "dealt with the structure, operation, and decision-making procedure of the various governmental agencies."¹¹⁸ Thus, the court felt no compulsion to define the term "records" broadly so as to include the medical tape system.

Also instructive is the District of Columbia Circuit's opinion in Soucie v. David.¹¹⁹ The magistrate in Siemens had relied on Soucie in rejecting the valuable property concept. The requested document in Soucie was the Garwin Report, in which a panel of experts made an assessment of the federal program for development of the supersonic transport (SST) aircraft. In declaring the Garwin Report to be an agency record, the court noted that

The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effect on our lives It would defeat the purposes of the OST (Office of Science and Technology), as well as the purposes of the Act, to withhold from the public factual information on a federal scientific program whose future is at the center of public debate.¹²⁰

The Garwin Report was a program assessment--an evaluation of the federal program for developing the SST. As such it was policy-oriented and had "informational" value.

One of the technical reports in the Siemens case provides an illustrative contrast with the Garwin Report. Siemens was concerned, in part, with technical reports on electron beam lithography. Some technical reports were released, while others, containing more recent and thus more valuable data, were denied the requester. One report which was released is entitled "Experimental Research on Fabrication of Interdigital Transducers for Acoustic Surface Waves." It was produced under Government contract by Westinghouse Research Laboratories four years prior to the request. The report's abstract describes its contents:

The objective of this program was to fabricate a variety of surface wave transducers on various substrates, using a digitally-controlled electron beam to expose the transducer patterns. Transducers were fabricated on lithium tantalate and lithium niobate substrates with finger and space widths varying from 1.6 to 0.6 micrometers, finger lengths from 240 to 400 micrometers, and number of fingers from 8 to 27 per transducer. An overlapping line segment technique was used along with multi-exposures to obtain line smoothness better than 0.04 micrometers. An exposure control with uniform 2.2% gradations was designed and used to obtain specified line widths. Vibration isolation and ambient magnetic e cancellation permitted electron beam exposures of device patterns be made in a relatively noisy environment.¹²¹

This released report is similar to other reports not released in that the data does not reflect the structure, operation, or decision-making functions of the Department of Defense. It is technically-oriented as opposed to the policy-oriented Garwin Report.

However, there are problems with a rule which declares that "policy" reports are agency records and "technical" reports are not. For example, a report which mixes raw technical data such as is found in the quoted abstract with a program assessment like the Garwin Report would require segregation of the valuable property and the informational material. Thus, a single document could suffer the anomalous fate of being partly an agency record and partly not an agency record.

A second, more fundamental problem with such a rule is the implicit assumption that raw technical data can have no informational value. Arguably, all technical data could have informational value. This is easier to perceive if the topic is a controversial one like the SST in Soucie v. David. Technical data may explain, or amplify, or contradict a policy decision in an area of controversy. Even in areas of little or no apparent controversy, technical data may be useful. Program direction, and funding, may flow from a technical input. A seemingly raw technical input which evaluates the feasibility of competing approaches may well have policy and budgetary implications.

The disclosure of technical data with a high acquisition cost and which provides technological leadtime may impact both the development contractor and the government. Competitors of the development contractor may wish to take advantage of whatever advances were made under government contract. If the subject matter of a contract concerned a contractor's trade secret or patentable invention, then the development contractor would have an interest in nondisclosure. Exemption four of the Information Act, discussed in Chapter Four of the thesis, may be useful in protecting such proprietary data from disclosure. However, even if the development contractor cannot demonstrate a legitimate proprietary interest in the data generated under government contract, the government itself may possess an interest in nondisclosure. For example, if the data concerns advances in the state of the art of a military critical technology and its disclosure would cause at least identifiable damage to the national security, the data may be classified. Exemption one of the Information Act, discussed in Chapter Two of the thesis, may be useful in protecting such sensitive data from disclosure. The government may desire to disclose data which falls into neither exemption one or four even though no Information Act request has been received. In this regard the Technical Information Act¹²² established the National Technical Information Service

(NTIS) as a clearinghouse for scientific, technical, and engineering information. Technical data is collected, classified, and made available to the public at large in order to stimulate technological growth.

The government may desire to restrict dissemination of certain data which falls into neither exemption one nor exemption four. The valuable property concept would be useful for such purposes. Critics of the valuable property concept will argue that unclassified, non-proprietary technical data belongs to the public and must be made available under the Information Act if not available through NTIS. If this view prevails in the courts, two alternatives remain. It is assumed the government will not abandon the role of generating, either by contract or in-house, such technical data. However, the data could be disclosed, not at nominal cost through the Information Act, but through the NTIS at a cost which will permit recoupment of the research and development. This concept is already a reality at NTIS: "The services and functions . . . shall be self-sustaining or self-liquidating and the general public shall not bear the cost of publications and other services which are for the special use and benefit of private groups and individuals" ¹²³ Similarly, Commerce Department special studies and special compilations performed pursuant to private request may be furnished "upon the payment of the actual or estimated cost of such special work." ¹²⁴ Fees may be reduced or waived when furnishing material which benefits the general public. ¹²⁵ If this course of action proves unsatisfactory, legislation could be enacted to explicitly recognize the valuable property concept.

CHAPTER TWO

THE NATIONAL SECURITY EXEMPTION

Not infrequently an Information Act request will be received for acquisition records which have been marked "Confidential," "Secret," or even "Top Secret."¹²⁶ For example, portions of acquisition plans, statements of work, technical proposals, invention disclosures, and final technical reports may be so classified. Agency personnel competent to make the classification/declassification determination will review the requested documents to determine if current disclosure would damage the national security. The "national security" includes the national defense and foreign relations of the United States. Exemption one of the Information Act empowers agency withholding of records which are

(A) (S)pecifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order¹²⁷

This language was the result of 1974 amendments enacted over presidential veto. Prior Information Act language allowed withholding of documents "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."¹²⁸ Prior to the Information Act, the Administrative Procedure Act allowed withholding of documents "requiring secrecy in the public interest."¹²⁹ All of these formulations contain broad language vesting considerable discretion in the executive branch.

The executive branch has traditionally protected the nation's secrets. This tradition is reflected in the only exemption which allows the executive branch to develop the substantive requirements for nondisclosure. Congress

did provide general guidance, but to say that material may be classified in the "interest of national defense or foreign policy" is simply to restate the subject matter of the exemption. Congress did act substantively in one scientific area. The Atomic Energy Act of 1954 controls access to and dissemination of "restricted data," which includes all data concerning the "(1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy" ¹³⁰ For other scientific and technical data, the current Executive Order must be examined.

The Executive Order

Executive Order 10501 ¹³¹ was in existence prior to enactment of the Information Act. It was superceded by Executive Order 11652 ¹³² on June 1, 1972. Then on December 1, 1978 Executive Order 12065 ¹³³ became effective, revoking its predecessor. This latest Executive Order does not appear to have modified the substantive criteria of classification. Executive Order 11652 had provided that the threshold requirement for classification was a reasonable expectation of injury to the nation's defense or foreign policy: "The test for assigning 'Confidential' classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security." ¹³⁴ The intermediate security classification was "Secret," which involved information which could reasonably be expected to cause "serious damage," ¹³⁵ and the most sensitive classification was "Top Secret," which involved the reasonable expectation of "exceptionally grave damage" ¹³⁶ to the nation's security. An example of "Secret" material was the disclosure of "significant scientific or technological developments relating to national security." ¹³⁷ An example of "Top Secret" material was the disclosure of "scientific or technological developments vital to national security." ¹³⁸

Executive Order 12065 makes no change in the definitions of the three levels of security classifications, except that the threshold category of "Confidential" information must be reasonably expected to cause not "damage," but "identifiable damage" to the national security.¹³⁹ Examples of "identifiable damage" are provided in an implementing Department of Defense Regulation:

(T)he compromise of information that indicates strength of ground, air and naval forces in the United States and overseas areas; disclosure of technical information used for training, maintenance, and inspection of classified munitions of war; revelation of performance characteristics, test data, design, and production data on munitions of war.¹⁴⁰

The prior Executive Order's examples of significant scientific or technological developments ("Secret") and scientific or technological developments vital to the national security ("Top Secret") were removed from Executive Order 12065 but preserved in the implementing DOD Regulation.¹⁴¹ The new Executive Order provides that scientific or technological information may be classified,¹⁴² if it relates to the national security,¹⁴³ if disclosure could be expected to cause at least identifiable damage to the nation's security,¹⁴⁴ and where the need to protect such information outweighs the public interest in disclosure.¹⁴⁵ The necessity of a relationship to the national security is further emphasized by an express prohibition in the Executive Order: "Basic scientific research information not clearly related to the national security may not be classified."¹⁴⁶ The implementing Air Force Regulation amplifies the rule: "A generalized relationship to national security is not sufficient reason for classifying, on the basis of lead-time advantage in scientific research data. Identify specific military application and operational advantage before classifying."¹⁴⁷

In addition to the substantive criteria, Executive Order 12065 provides procedural requirements covering such matters as the designation of agency heads with authority to classify to the various security levels,¹⁴⁸

limitations on the delegation of classification authority,¹⁴⁹ the duration of classification and authority to extend it,¹⁵⁰ document markings,¹⁵¹ declassification authority,¹⁵² and access to classified documents.¹⁵³ The current test for withholding data under the first exemption of the Information Act requires compliance with both substantive and procedural requirements:

Exemption 1 now applies only if the District Court determines that (1) the material withheld is properly classifiable under the substantive criteria set forth in the relevant Executive order, and (2) the material has in fact been properly classified according to procedures outlined in the Executive order.¹⁵⁴

The federal District court has not always played as large a role as is described in this test. In 1973 the Supreme Court viewed the judicial role as being rather limited under the original language of exemption one. In Environmental Protection Agency v. Mink, the Court declared the test "to be simply whether the President has determined by Executive Order that particular documents are to be kept secret."¹⁵⁵ Or as Justice Stewart noted in a concurring opinion, Congress "has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been."¹⁵⁶ In 1974 Congress enacted amendments to the Information Act, over presidential veto, which left no doubt that the judiciary shall determine exemption one cases de novo,¹⁵⁷ may examine agency records in camera at its discretion,¹⁵⁸ shall order the release of reasonably segregable, unclassified portions of agency records,¹⁵⁹ and shall place the burden of proof to support nondisclosure on agencies.¹⁶⁰ At the same time the traditional role and special expertise of the executive branch in matters of national security was not completely ignored. The Conference Report on the 1974 Amendments recognized that

(T)he Executive departments responsible for national defense and foreign policy matters have some unique insight into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.¹⁶¹

The Classification Decision

In spite of the ascribed "unique insights" of federal agencies, the classification decision remains a difficult one. At least three variables should be examined: (1) the degree of significance of a scientific or technological development, (2) the degree of relationship to a military weapons system, and (3) the relative technological state of the art of other nations. For example, the applicable Department of Defense Regulation notes that classification of basic scientific research would be appropriate if the information concerns an *unusually significant* scientific "breakthrough," there is sound reason to believe the information is not known or within the state of the art of other nations, and it supplies the United States with an advantage directly related to national security.¹⁶²

Some scientific developments are so sensitive that the classification decision has been removed from the executive branch. Thus, "restricted data" such as the manufacture of atomic weapons is controlled by the Atomic Energy Act of 1954.¹⁶³ To determine the degree of importance of other technologies, the "military critical technology" (MCT) list is helpful. The MCT list is used to determine which technologies would be considered as candidates for export controls. The list was published in January 1979, and contains fifteen advanced technologies, including, for example, computer systems, telecommunications, guidance and control systems, microwave components, fiber optics, and sensors.¹⁶⁴ Data concerning any of these exotic technologies may be a candidate not only for export controls but also for classification. Of

course, in formulating the MCT list, considerably more is evaluated than merely the significance of the scientific or technological development. The Deputy Under Secretary of Defense for Research and Engineering, Dr. Ruth Davis, recently outlined some of the key factors considered:

The retention of a military critical technology on this (MCT) list or the addition of new technologies is a function of at least the following: changing comparative military capabilities; changing comparative technological positions; foreign availability; changing national policies; the "half-life" of the technology state-of-the-art; ease of technology transfer; and the authority of the Government to control the relevant principal technology transfer mechanisms.¹⁶⁵

These considerations, which are important in composing the MCT list, are analogous to the considerations used to identify classifiable data. Both sets of variables focus on how advanced the technology is, the impact of the advanced technology on military weapons systems, the state of the art in other countries, and the ease with which technology may flow to other countries.

Once advanced technologies are identified, both the MCT list and potentially classifiable data require a direct relationship with military weapons systems. Every advanced technology has a potentially wide-ranging impact, but it is the impact on military capability which requires scrutiny. The Director of Strategic Technology and Munitions Control of the Department of Defense, Mr. Maurice J. Mountain, recently outlined the rationale for focusing on military applications. He was discussing export controls on technology, but the rationale is equally applicable to classification of the nation's secrets.

(M)any current discussions . . . tend to treat any technology as important to national security if, in some way, it contributes to the economic, political or sound well-being of the United States. Such a view overlooks the fact that the necessary link between technology and national security is the production of military weapons systems. One explanation is the national tendency to regard all things which contribute to military power as having direct military value. To a degree this view is correct, but it is far too general to be useful.

(W)hatever impact a technology must have on the quality of human life, the domestic economy, foreign trade, the balance of payments or even diplomatic relations, its national security significance depends entirely on the extent to which it is or may be applied to a specifically military purpose.¹⁶⁶

Thus, of some eight hundred distinct technologies in science and engineering, half were considered critical to the national security a decade ago. Then in 1971, a total of 138 technologies was considered critical. Finally, the Military Critical Technology list was pared to fifteen technologies in 1979. The other 785-odd technologies not on the list no doubt relate to national security in varying degrees, but the crucial technologies currently warranting consideration for export controls are those fifteen on the MCT list. Similarly, the identification of classifiable technical data requires a specific military application to military weapons systems.

Once advanced technologies are pared to those directly related to military munitions, a final variable should be examined: the technological state of the art in other countries. This variable is important for both export controls on data and the classification of data. Generally, even technical data which is classified or not exported by the United States will ultimately be developed by other countries or imported from third countries. To a large extent, the control of technical data is concerned with the preservation of a lead-time advantage. As Dr. Ruth Davis recently observed:

Our national security has in recent times become increasingly dependent upon our military technological superiority which in turn is based on maintaining our technological lead time.

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The technology-rich countries really have not waged war with each other (over the last thirty years). War has become a technology fencing match, not a loss of life; how to counter an advance on the other side with an advance on our own side rather than going to war.¹⁶⁷

However, even data which concerns an advanced technology, which has specific military applications, and in which the United States enjoys a significant lead-time advantage may not be classified. For example, only four of the ninety-two documents requested in Siemens Corporation v. Department of Defense,¹⁶⁸ a case discussed in the preceding chapter, were withheld under exemption one. Yet a description of document contents suggests that many more

were serious candidates for classification. The documents variously included plans for development, agenda of meetings, technical reports, comparison tables, specifications, reviews, guidelines, proposals, trip reports, annual reports, technical evaluations, project status reports, memoranda, briefings, technical charts, contracts, workbooks and catalogs. All of the documents were concerned with electron beam lithography, an advanced technology which is a prime candidate for export controls, and perhaps for classification.

Electron beam lithography permits a significantly greater number of component elements to be placed on integrated circuits and is important in the fabrication of various electronic devices. Specific military applications include electronic warfare wideband receivers for obtaining signal intelligence, covert secure communications, terminal homing missile electronics, ballistic missile defense systems, satellite-to-satellite and satellite-to-ground communications, expendable munition-delivered electronic warfare jammers, and mini-remote piloted vehicles. Siemens Corporation specifically requested all documents concerning each of these military applications. Since the United States enjoys a significant lead time in electron beam lithography and since this exotic technology has been identified with specific military applications, why were more of the requested documents not classified? To the extent such data was in fact classifiable, the military departments perhaps believed that the lead-time advantage could be maintained by control of the information short of classification. Possibly the "valuable property" concept discussed in Chapter One and generally the existence of Information Act exemptions lulled agencies into a sense of information security. At the same time, if there is a reasonable expectation that information can be protected sufficiently without classification, then today's climate against excessive government secrecy would suggest non-classification. Finally, there may be a more practical reason for not classifying otherwise classifiable data.

Unclassified data is easier to disseminate and exploit, therefore facilitating future developments, including next year's lead-time advantages.

As one commentator observed before the enactment of the Information Act:

In the view of an influential part of the scientific community innovation and development depend essentially upon a widespread flow of communications among scientists working on related problems. Insofar as government secrecy stifles such communication, it hampers scientific progress As one scientist has noted: ". . . (T)he really significant new concepts of science are often . . . the result of associations of widely diverse facts and ideas that may not hitherto have seemed remotely connected. Such ideas as the laws of mechanics and the concepts of space and time derived from astronomy, together with the work of Planck on high temperature radiation, led Einstein to postulate the equivalence of mass and energy. On this . . . is based the development of nuclear energy. Yet today, any . . . military organization . . . under present security rules, would certainly classify the work of Planck so that it would be denied to a potential Einstein."¹⁶⁹

What would be true for the work of Planck may also be true for technologies such as electron beam lithography. Classifying a document clogs communication channels to a degree. As might be expected, classified material generates special requirements: in safekeeping and storage;¹⁷⁰ as to access, dissemination and accountability;¹⁷¹ in its transmission;¹⁷² in its disposal and destruction;¹⁷³ and through procedures to be followed in the event of compromise.¹⁷⁴ Access to classified material, for example, is a function of both a security clearance evidencing trustworthiness and a demonstrated need for access. Only the minimum number of persons necessary are cleared and granted access to classified material and access is provided only to those segregable portions of classified material for which a need can be demonstrated. Such procedures are clearly necessary in the handling of classified material but not unexpectedly serve to hamper the dissemination and exploitation of "valuable property" as well as to magnify handling costs.

As a result of the additional constraints mandated by classification, it would not be surprising to find data classifiable under exemption one and Executive Order 12065 viewed as sensitive and therefore secured to the extent

possible, but still not classified. However, if protection through the "valuable property" concept or other Information Act exemptions proves illusory, then data which provides a lead-time advantage such as that concerning electron beam lithography could be re-examined as potential candidates for classification. Such re-examination may have the unfortunate effect of increasing the volume of classified material.¹⁷⁵ However, if sensitive data legitimately fulfills established substantive criteria, and if no other protection is available, then classification may be in order, even classification subsequent to receipt of an Information Act request.¹⁷⁶ In this event the true cost of the Information Act would be the diminished flow of information and the impact this would have on scientific and technological advances.

CHAPTER THREE

STATUTORY EXEMPTION FROM DISCLOSURE

Exemption three acknowledges the existence of statutes other than the Information Act which contain provisions pertaining to the nondisclosure of information. Statutes which qualify under exemption three assume importance when other exemptions do not reach the data in question to permit nondisclosure, or when an exemption is applicable but an agency still desires to exercise its discretion to disclose the requested records. Exemption three is distinguishable from other exemptions which are merely "permissive"¹⁷⁷ in character. For example, documents which are "exempted" from disclosure under exemption four (business records) are merely exempt from mandatory disclosure and may still be disclosed in the proper exercise of agency discretion. An exemption three statute by definition either removes agency discretion or provides criteria to guide agency discretion. Thus, depending on the language of the exempting statute, nondisclosure may be mandatory.

The original language of exemption three protected documents "specifically exempted from disclosure by statute."¹⁷⁸ This original formulation was designed to protect, according to the House Committee on Government Operations, "nearly 100 statutes or parts of statutes which restrict public access to specific Government records."¹⁷⁹ In spite of the relative clarity of the legislative history of exemption three, courts were not always certain whether or not statutes qualified.¹⁸⁰ The Supreme Court attempted to resolve that issue in Federal Aviation Administration v. Robertson.¹⁸¹ The statute in question was the Federal Aviation Act, which provided that whenever written objection was made to the disclosure of information filed or obtained

under the Act, "the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public."¹⁸² The legislative history of exemption three convinced the Supreme Court that the Federal Aviation Act qualified.¹⁸³ Justice Stewart, in a concurring opinion, declared that

(W)hen an agency asserts a right to withhold information based on a specific statute of the kind described in Exemption 3, the only question to be determined in a district court's de novo inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be.¹⁸⁴

The House Committee on Government Operations had referred to nearly one hundred statutes which restrict access to specific government records.¹⁸⁵ Thus, the requesters in Robertson argued that qualifying statutes must either name the documents which may be withheld, or at least describe their category. The Supreme Court viewed such an intepretation as repealing nondisclosure statutes by implication and rejected the argument.¹⁸⁶

Congress responded to the Robertson decision a year later by amending exemption three. Today the Information Act does not apply to records which are

(S)pecifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.¹⁸⁷

In case there was any doubt as to how Congress viewed the Robertson decision, the Conference Report on the 1976 Amendments asserted that "(t)he conferees intend this language to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson"¹⁸⁸ The 1976 Amendments were designed to place the nondisclosure decision in the hands of Congress, either by mandating nondisclosure and thereby avoiding any agency discretion, or by allowing agency discretion but pursuant to criteria provided by Congress.

An example of a new exemption three statute might be found in the very statute condemned in the 1976 Amendments--section 1104 of the Federal Aviation Act of 1958.¹⁸⁹ In 1978 this section was amended to arguably comply with the revised exemption three test. The new language indicates that records shall be withheld "if disclosure of such information would prejudice the formulation and presentation of positions of the United States in international negotiations and adversely affect the competitive position of any air carrier in foreign air transportation."¹⁹⁰ Thus Congress provided criteria to guide the exercise of agency discretion. The prior language had provided for unfettered agency discretion: records were withheld if in the judgment of the agency the "public interest" did not require disclosure.¹⁹¹ Today the revised Federal Aviation Act arguably qualifies under exemption 3(B). The revision and possible resurrection as an exemption three statute points up the dynamism of this area of the Information Act. If a statute does not qualify under exemption three at one point in time, subsequent amendments will necessitate re-evaluation.

The only other statute mentioned in the Conference Report on the 1976 Amendments was section 1106 of the Social Security Act.¹⁹² This Act was also deemed by the conferees to fall outside of amended exemption three. The statute provides for nondisclosure of records "except as the Secretary of Health, Education, and Welfare or the Secretary of Labor . . . may by regulations prescribe" ¹⁹³ Thus, unfettered discretion is vested in the named agencies without benefit of congressional guidance.

A third statute which illustrates the new test through failure to meet it is section 7(c) of the Export Administration Act of 1969.¹⁹⁴ The statute provides that information obtained under the Act and deemed confidential shall not be disclosed unless the agency determines the nondisclosure to be "contrary to the national interest."¹⁹⁵ In American Jewish Congress v. Kreps¹⁹⁶

the Commerce Department determined that release of certain requested records would be contrary to the national interest and relied on the Export Administration Act as an exemption three statute. The D.C. Circuit Court found that the Act failed to qualify under exemption three, citing similarities with the (unamended) Federal Aviation Act and the Social Security Act.¹⁹⁷

These and other examples imply a congressional sense that the crucial distinction lay between statutes that in some manner told the official what to do about disclosure and those that did not significantly inform his discretion in that regard.¹⁹⁸

Section 10 of the Federal Insecticide, Fungicide, and Rodenticide Act¹⁹⁹ provides an example of a statute which "tells the official what to do about disclosure." The statute forbids disclosure of trade secrets or confidential commercial or financial information.²⁰⁰ This provision appears to be calculated to divest agencies of discretion to disclose records which qualify under exemption four (business records). The language fits paragraph A of exemption three, which mandates nondisclosure and leaves no discretion in the agency. Interestingly enough, the statute was amended September 30, 1978.²⁰¹ Detailed criteria were provided by Congress to aid the agency in making the disclosure decision, such that a "paragraph A" exemption three statute (mandated nondisclosure) has apparently been transformed into a "paragraph B" exemption three statute.²⁰² In this case the statute appears to continue to qualify as an exemption three statute, but serves to illustrate once again the dynamism of the exemption. A number of other statutes appear to qualify under exemption three.²⁰³ However, the statute cited most frequently in the protection of federal acquisition records is the Trade Secrets Act.²⁰⁴

The Trade Secrets Act

Unless disclosure is otherwise authorized by law, the Trade Secrets Act forbids disclosure of "trade secrets, processes, operations, style of work,

or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permit(ing) any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person"205 A decade ago if federal agencies had been asked to provide examples of exemption three statutes, the Trade Secrets Act would have been one of the first statutes cited. The Attorney General's 1967 Memorandum singled out section 1905 as one of a handful of qualifying statutes.²⁰⁶ The Armed Services Procurement Regulation (now Defense Acquisition Regulation) cites it as one of four examples of qualifying statutes.²⁰⁷ Similarly, agency regulations cite section 1905 as an exemption three statute.²⁰⁸ The Supreme Court in Chrysler Corporation v. Brown recently observed that during the hearings on the Information Act, "18 U.S.C. § 1905 was the most frequently cited restriction on agency or department disclosure of information."²⁰⁹ The Supreme Court did not reach the issue of whether section 1905 is in fact an exemption three statute.²¹⁰

A qualifying exemption three statute must either tell an agency to withhold a record, leaving no discretion in the agency; or must provide the criteria an agency will use to decide whether or not to disclose; or must provide the particular types of records an agency will compare with the requested records in order to determine whether or not to disclose. Arguably, "particular types" of records are provided by section 1905, including records containing trade secrets, processes, operations, style of work, confidential statistical data, and the amount and source of income, expenses, profits and losses. Other statutes are perhaps more specific in the sense that they address particular types of records of certain agencies. For example, trade secrets acquired pursuant to the registration of pesticides are prohibited from disclosure under the Federal Insecticide, Fungicide and Rodenticide

Act.²¹¹ The language of section 1905 arguably protects trade secrets government-wide.²¹² A separate statute protecting trade secrets received by the Department of Defense or by NASA during the acquisition process would be more specific but there is no indication in the language of exemption three or in its legislative history that such specificity is necessary for the exemption to be invoked.

In addition to the exemption three test for "particular types of matters," there is another part of exemption three which section 1905 arguably satisfies. The exemption also embraces a statute which "requires that the matters be withheld from the public in such a manner as to leave no discretion on this issue"²¹³ Section 1905 mandates nondisclosure of certain business records, upon penalty of fine, imprisonment and removal from office. The only exceptions are disclosures "authorized by law." Thus, Congress arguably makes the exceptions leaving no discretion in agencies.

However, in some quarters the Trade Secrets Act does not qualify under exemption three and never has. The House Committee on Government Operations recently published its view in an authoritative report:

Prior to this amendment (of exemption three) some courts incorrectly held that section 1905 was an exemption 3 statute. See Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977). The better view is that section 1905 was never an exemption 3 statute. See National Parks & Conservation Association v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976). The committee has never considered that section 1905 qualified under exemption 3, and since the Sunshine Act only narrowed the scope of the exemption, it is not possible for section 1905 to qualify under the amended exemption.²¹⁴

As noted, the House Committee embraces the analysis of National Parks v. Kleppe, which distinguished between the specificity required by exemption three and the generality of section 1905: "(S)ection 1905 by its own terms is a statute of general applicability and not one that specifically defines or categorizes the information to be exempted within the meaning of the third exemption."²¹⁵ It is true that section 1905 is a statute of general applicability, but this

characteristic appeared to pass muster in FAA Administrator v. Robertson:

The respondents can prevail only if the Act is to be read as repealing by implication all existing statutes "which restrict public access to specific government records." . . . The term "specific" as there used cannot be read as meaning that the exemption applies only to documents specified, i.e., by naming them precisely or by describing the category in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task. Such a construction would also imply that Congress had undertaken to reassess every delegation of authority to withhold information which it had made before the passage of this legislation--a task which the legislative history shows it clearly did not take.²¹⁶

The District of Columbia Circuit's response to this analysis is that Robertson was expressly overruled by Congress with the 1976 Amendments to exemption three.²¹⁷ However, it is not clear that Congress, in 1976, demanded more specificity than section 1905 possesses. As a later opinion from the D.C. Circuit Court of Appeals observed, "the crucial distinction lay between statutes that in some manner told the official what to do about disclosure and those that did not significantly inform his discretion in that regard."²¹⁸ Does section 1905 adequately tell the agency what to do about disclosure? The debate may continue but is largely academic due not to the amendment of exemption three, but to the peculiar construction of section 1905 itself.

Section 1905 forbids disclosure "not authorized by law." The Information Act commands disclosure of records which do not fall within an exemption. Thus, nonexempt material is "authorized by law" to be disclosed. The normal exemption three statute forbids disclosure independent of exempt or nonexempt status, but section 1905 by its own construction acts only on exempt records. Section 1905 is not operative apart from an exemption such as the business records exemption. Thus, the section 1905-exemption three issue is relatively insignificant. The important issues are whether an exemption such as the business records exemption is applicable to the requested records and whether section 1905 also applies to the same records. If the requested records do not fit into an exemption, section 1905 is inoperable by its own

language. If the requested records do fit into an exemption, and also into section 1905, the latter will constrain the discretion an agency has to disclose even the exempt material. A submitter of information bringing a reverse-FOIA lawsuit to prevent disclosure will receive an Administrative Procedure Act judicial review of an agency decision to disclose. The agency decision will not survive APA review if it is an "abuse of discretion" or "contrary to law."²¹⁹ If both an Information Act exemption and section 1905 apply to the requested records, then disclosure should be deemed both an abuse of discretion²²⁰ and contrary to law.²²¹ As a House Report composing part of the legislative history of the 1976 Amendments observed:

Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information.²²²

Due to the similarity in language between exemption four and section 1905,²²³ the potential exists to effectively convert a permissive exemption into a mandatory one by removal of an agency's discretion. Two frontal attacks have been launched against the ability of section 1905 to constrain an agency's discretion to disclose exempt material. The first consists of agency regulations which purport to satisfy the "authorized by law" language of section 1905, thereby rendering section 1905 inoperable even when requested material falls into exemption four. The next section deals with this issue. The second line of argument is on the breadth of section 1905 itself. The thesis is that the broad language of section 1905 is misleading--that the reach of the Act is in fact extremely narrow. This issue will be addressed in the concluding section.

Negating Section 1905 With Agency Regulations

Section 1905 on its face compels nondisclosure of trade secrets and certain commercial and financial information unless disclosure is "authorized by law." The Information Act supplies the authorization by law for nonexempt material. However, the Information Act does not authorize the disclosure of exempt material. May agency regulations supply the "authorization by law" for the disclosure of exempt material, thereby rendering the Trade Secrets Act inoperable? Restated, may an agency head issue a regulation nulling a criminal statute in order to be able to indulge in the prohibited conduct? The question arises from the peculiar construction of section 1905, which forbids disclosure unless "authorized by law," and the body of law surrounding agency regulations which are accorded the "force and effect of law."²²⁴ Definitionally, agency rules with the "force of law" are denominated "legislative" or "substantive" regulations. The Administrative Procedure Act distinguishes between these "substantive rules" and mere "interpretive rules."²²⁵ To be accorded the force and effect of law, a rule or regulation must affect individual rights and obligations, be issued by an agency pursuant to statutory authority, and be issued in compliance with the procedural requirements of the Administrative Procedure Act.²²⁶ The second requirement, statutory authority, represents the critical issue with respect to agency disclosure regulations and section 1905. Generally, "individual rights and obligations" are affected by regulations which authorize the disclosure of records. Both requesters of records and submitters of information clearly possess rights affected by disclosure regulations.²²⁷ As for the procedural requirements of the APA, a failure of compliance will relegate a substantive rule candidate to the status of a mere interpretive rule and the latter will not supply the "authorization by law" demanded by section 1905. However, a failure to comply with the procedural requirements involving notice and an opportunity to comment²²⁸ are curable. Thus, the key

constraint is the necessity for regulations to be issued pursuant to statutory authority.¹

The judicial battleground in the search for acceptable statutory authority has often centered on the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and its various compliance agencies. The fact situation which has often led to the courtroom arises from the OFCCP requirement for government contractors to submit information relative to their affirmative action programs²²⁹ and the Department of Labor regulations authorizing disclosure of equal opportunity data.²³⁰ Submitters of information have invoked section 1905 to prevent disclosure. Agencies have argued in response that the disclosure regulations should be accorded the "force and effect of law" such that section 1905 is satisfied. Candidates for the statutory authorization necessary for the promulgation of substantive disclosure regulations include the Information Act itself, the general "house-keeping" statute found at 5 U.S.C. § 301,²³¹ and Executive Order 11,246.²³²

Both the Information Act and 5 U.S.C. § 301 were measured and found wanting as regulation-authorizing statutes by the District of Columbia Circuit Court in Charles River Park "A", Inc. v. Department of Housing and Urban Development.²³³ However, subsequent to Charles River, the Third,²³⁴ Seventh,²³⁵ and Eighth Circuits²³⁶ identified 5 U.S.C. § 301 as an adequate grant of authority to issue substantive disclosure regulations. The District of Columbia Circuit in Charles River had been concerned with the disclosure of financial data, while the Third, Seventh, and Eighth Circuit Courts of Appeals were all concerned with the disclosure of equal employment opportunity information. The view that 5 U.S.C. § 301 or some other authority has been invested with the capacity to legitimate substantive disclosure regulations appeared to be gaining momentum²³⁷ until the case from the Third Circuit reached the Supreme Court sub nomine Chrysler Corporation v. Brown.²³⁸

In Chrysler, the disclosure regulations in question were found to affect individual rights and obligations.²³⁹ However, none of the tendered regulation-authorizing statutes passed muster,²⁴⁰ and the regulations also failed to comply with the procedural requirements of the Administrative Procedure Act.²⁴¹ The Supreme Court did not reach the issue of whether or not section 1905 was an exemption three statute.²⁴² Section 1905 nevertheless played a critical role in that the Administrative Procedure Act specifies that agency decisions shall be set aside if "not in accordance with law."²⁴³ The Court determined that a violation of section 1905 would be a violation of the law.²⁴⁴ In this way the Court reached the issue of whether agency regulations may provide the "authorization by law" to satisfy section 1905.

Requesters and agencies argue that the Information Act itself authorizes the promulgation of regulations providing for disclosure. After all, nonexempt records must be disclosed and exempt records may be disclosed in the exercise of agency discretion. If there was any remaining doubt as to this proposition, it was laid to rest by the Supreme Court in Chrysler.²⁴⁵ The agency had argued that regulations providing for the disclosure of exempted records emanate from the congressional intent underlying the Information Act.²⁴⁶ The difficulty with this view is the very language of the Information Act, which provides that the Act "does not apply" to exempted records.²⁴⁷ As the Supreme Court noted in Chrysler: "Since materials that are exempt from disclosure under the FOIA are . . . outside the ambit of that Act, the Government cannot rely on the FOIA as congressional authorization for disclosure regulations that permit the release of information within the Act's nine exemptions."²⁴⁸ The proper way to recognize the "permissive" nature of Information Act exceptions as well as section 1905 is illustrated by Department of Defense regulations:

An exempted record or reasonably segregable portion of a record . . . should be made available upon the request of any member of the public when, in the judgment of the releasing component or higher authority, no significant and legitimate governmental purpose would be served by withholding it under an applicable exemption. Consistency with a statutory requirement . . . e.g., 18 U.S.C. 1905 (Confidential Trade Information) . . . or other requirement of law constitutes a significant and legitimate governmental purpose.²⁴⁹

The second regulation-authorizing candidate considered by the Supreme Court in Chrysler was 5 U.S.C. § 301, which provides that

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.²⁵⁰

Some form of this statute has been around since the eighteenth century. The language and history of section 301 suggest a "housekeeping" statute--a grant of authority to an agency to regulate its affairs.²⁵¹ However, there is a difference between authorizing "substantive" rules and authorizing rules providing for "day-to-day office housekeeping."²⁵² Furthermore, the sponsor of the 1958 amendment to section 301, Congressman Moss, assured the House that the proposed amendment "does not effect the confidential status of information given to the Government and carefully detailed in title 18, United States Code, section 1905."²⁵³ This would appear to be dispositive, but at least one commentator has labeled any inferences drawn from the remarks of Congressman Moss to be based upon "a misinterpretation of the 1958 amendment"²⁵⁴

Mr. Moss never stated that the housekeeping statute itself was not intended to affect information encompassed by section 1905--only that the amendment to the housekeeping statute would not affect the prohibitions against disclosure contained in section 1905 and several other statutes.²⁵⁵

This observation was not persuasive in Chrysler, for "if Congressman Moss thought that records within the terms of section 1905 could be released on the authority of a § 301 regulation, why was he (and presumably the House) concerned with whether the amendment affected § 1905?"²⁵⁶

Regardless of the impact of the remarks of Congressman Moss, the Supreme Court was largely impressed by the "housekeeping" nature of section 301 itself. Such a statute is appropriate for propagating "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"²⁵⁷ as opposed to "legislative" or "substantive" regulations.²⁵⁸

The final regulation-authorizing candidate considered by the Supreme Court in Chrysler was Executive Order 11,246.²⁵⁹ Section 201 of the Executive Order authorizes the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." The Secretary of Labor has issued regulations which provide for the disclosure of exempt affirmative action data.²⁶⁰ One commentator identified the sources of the Secretary's authority as the Information Act and the Executive Order, and concluded that the disclosure regulations "appear to be within the Secretary's authority."²⁶¹ The real issues, however, are whether the regulations should be accorded the "force of law," and the difficulty of finding a substantive regulation-authorizing statute since the Executive Order is not itself a statute. The Information Act had previously been discussed and found wanting. Thus the inquiry focuses on the search for the statute which authorizes the Executive Order. The Executive Order itself provides little assistance in unraveling its origin. The Order merely states that it is promulgated under the authority vested in the president by "the Constitution and statutes of the United States."²⁶² Suggestions as to the source of Executive Order 11,246 have ranged from Titles VI and VII of the Civil Rights Act of 1964²⁶³ to the Federal Property and Administrative Services Act of 1949.²⁶⁴ Whatever the proper statutory origin, once it is identified the next inquiry is whether the disclosure regulations in question are reasonably within the contemplation of that grant of legislative authority. A statute may expressly provide for the promulgation of regulations which will be invested

with the force and effect of law.²⁶⁵ However, such specificity is unnecessary. The test remains whether regulations are reasonably within the contemplation of the authorizing statute.²⁶⁶ The Supreme Court in Chrysler gathered all of the suggested grants of authority for the disclosure regulations, examined them against this test, and found them wanting:

We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and unless we were to hold that any federal statute that implies some authority to collect information must grant legislative authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the Government here.

The relationship between any grant of legislative authority and the disclosure regulations becomes more remote when one examines § 201 of the Executive order. It speaks in terms of rules and regulations "necessary and appropriate" to achieve the purposes of the Executive order. Those purposes are an end to discrimination in employment by the Federal Government and those who deal with the Federal Government. One cannot readily pull from the logic and purposes of the Executive order any concern with the public's access to information in Government files or the importance of protecting trade secrets or confidential business statistics.²⁶⁷

Thus the OFCCP disclosure regulations do not enjoy the "force of law," and do not render section 1905 inoperable. The Supreme Court remanded the case so that the court of appeals could determine if it agreed with the district court that disclosure of some of the requested documents is barred by section 1905.

In light of the Supreme Court's opinion in Chrysler, the Third Circuit's 1977 decision in Westinghouse Electric Corporation v. United States Nuclear Regulatory Commission²⁶⁸ warrants review. That reverse-FOIA case stemmed from changes made in the Nuclear Regulatory Commission's disclosure regulations. The NRC receives proprietary information pursuant to its licensing and regulatory functions and Westinghouse feared the revised rules would lead to unwarranted disclosures. One of the submitter's arguments was that the revised regulation violated section 1905. The court dismissed the argument by declaring the regulations in question to have the "force of law." Section 1905 was deemed satisfied since it prohibits disclosure only to the extent not

"authorized by law."²⁶⁹ The NRC disclosure regulations affect rights and obligations, and appear to have been properly promulgated in accordance with the APA's procedural requirements.²⁷⁰ Thus the issue was whether the regulations were reasonably within the contemplation of a statutory grant of authority. The authorizing statute was section 161(p) of the Atomic Energy Act of 1954, which provides that: "In the performance of its functions the Commission is authorized to . . . (p) make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this chapter."²⁷¹ Westinghouse argued that though section 161(p) vests the NRC with broad rule-making power, regulations providing for disclosure of proprietary data are not "reasonably related to the purposes of the Atomic Energy Act."²⁷² The Third Circuit dismissed the argument: "Such an argument is specious in light of the necessity for the NRC to adopt some regulations for determining whether information obtained in its various proceedings is to become public information."²⁷³

Perhaps some regulations are indeed necessary, but the real issue is whether the regulations rise to the level of "substantive" rules, or whether they are to be identified as mere interpretive rules, general statements of policy, or rules of agency practice and procedure. The latter will not satisfy section 1905. In Chrysler, the Supreme Court found that the authorizing statutes for OFCCP disclosure regulations were concerned with ending employment discrimination and not the disclosure of proprietary data, and concluded that the disclosure rules were not reasonably within the contemplation of the statutes.²⁷⁴ Arguably the authorizing statute for NRC disclosure regulations is similarly concerned with other than the disclosure of proprietary data, and similarly such rules may not be "legislative" rules. It does not follow that the NRC rules in question must be struck down; the only conclusion to be drawn is that the rules do not render section 1905

inoperative.²⁷⁵

Recent cases have identified a regulation which qualifies as having the "force and effect of law." The substantive regulation is found at 20 C.F.R. § 442.435²⁷⁶ and provides that the Department of Health, Education and Welfare will disclose cost reports required by statute to be submitted by hospitals providing Medicare services. The cost reports are submitted in order to receive reimbursement for Medicare services rendered. The substantive rule issue was squarely before the Fifth Circuit in St. Mary's Hospital, Inc. v. Harris.²⁷⁷ The Supreme Court's Chrysler decision was dispositive. Submitter-St. Mary's Hospital argued that in light of the Trade Secrets Act disclosure of the cost reports would be, in the language of the APA, an abuse of discretion, contrary to law, and in excess of statutory authority.²⁷⁸ The Fifth Circuit used the Chrysler framework of analysis. First, the regulation was deemed substantive, that is, one that affected individual rights and obligations since its subject matter dealt with both the right to information and the right to data confidentiality. Second, the regulation was deemed properly promulgated under the APA, that is, published in the Federal Register with an opportunity to comment provided, and comments were considered prior to regulation issuance. Third, the regulation was deemed promulgated pursuant to legislative authority delegated to HEW by Congress.²⁷⁹ The statute in question, 42 U.S.C. § 1306, provides that: "No disclosure . . . of any file, record, report or other paper, or any information, obtained at any time (by HEW) shall be made except as the Secretary of Health, Education, and Welfare . . . may by regulations prescribe" ²⁸⁰

It is clear that Congress has authorized the Secretary to promulgate regulations pertaining to disclosure of records, presumably including cost reports. The Fifth Circuit understandably concluded that disclosure was "authorized by law" such that the Trade Secrets Act was nullified.

Interestingly enough, this very language which serves to authorize substantive HEW disclosure regulations falls short of qualifying under exemption three of the Information Act. The unbridled discretion vested in the agency by 42 U.S.C. § 1306 is such that the legislative history of the 1976 Information Act amendments expressly placed the statute outside of exemption three.²⁸¹ Such a state of affairs raises interesting questions. What if the Secretary of HEW used the delegated authority to issue nondisclosure regulations? Then 42 U.S.C. § 1306, which fails to qualify as an exemption three statute, may nevertheless be effectively converted into a nondisclosure statute. However, it may be presumed that any cost reports withheld under such regulations consist of exemption four commercial or financial data, as to which the agency already enjoys discretion to withhold. Could a nondisclosure regulation issued pursuant to statute forbid disclosure of nonexempt records? Would the general Information Act control, or the more specific (and perhaps later in time) statute and its implementing regulations? Presumably an agency head would be expected to exercise even unfettered discretion to promulgate regulations in a manner consistent with existing legislation, including the Information Act. In all probability only if Congress in its authorizing statute pointed the way for regulations which withhold nonexempt data would such regulations pass judicial muster.

Negating Section 1905 by Narrowing Its Reach

Even if courts refuse to identify section 1905 as an exemption three statute, exemption four has breathed new life into the Trade Secrets Act. Nonexempt data must be disclosed, but disclosure of those records falling both within exemption four and also section 1905 is "contrary to law." As discussed in the previous section, properly promulgated regulations authorizing disclosure are one way for agencies to disclose and still escape the reach of section 1905.

But if no such regulations exist or if the regulations which do exist are mere "interpretive" rules without the force and effect of law, then the issue shifts to whether the requested records are within the language of both exemption four and section 1905. Exemption four, the topic of the next chapter, is drawn broadly to encompass trade secrets and commercial or financial information. Section 1905 is also drawn broadly, encompassing trade secrets, processes, operations, style of work, apparatus, income and expenditures, and profits and losses in the possession of any federal agency. Courts have generally concluded that the scope of exemption four and section 1905 are both broadly drawn with respect to the types of protected subject matter.²⁸² However, the statutory origins of section 1905 have received little attention from courts.

Section 1905 is a codification of former 15 U.S.C. § 176b (1940),²⁸³ 18 U.S.C. § 216 (1940),²⁸⁴ and 19 U.S.C. § 1335 (1940),²⁸⁵ all statutes narrowly drawn. An occasional inquiry has focused on the broadly drawn codification versus the narrowly drawn predecessor statutes, and on the issue of which controls. Perhaps the first exposition of the argument was found in a General Accounting Office memorandum published some fifteen years ago.²⁸⁶ One of the early law review articles on the Information Act also outlined the issue and the GAO argument.²⁸⁷ However, any implications to be drawn from the codification process awaited a 1977 essay by Mr. Daniel Gorham Clement.²⁸⁸ Mr. Clement's authoritative analysis, as well as an adverse ruling on the section 1905 issue in the Chrysler case, perhaps inspired the Department of Justice to insist that Federal agencies "view the statute (section 1905) as being not broader in scope than the combined scopes of the three predecessor statutes of which it is a consolidation"²⁸⁹ The DOJ did not always view section 1905 as a narrow statute, but in earlier times had joined virtually the entire executive branch in presuming that the broad language of

the statute defined its scope.²⁹⁰ This DOJ decision would perhaps put the issue to rest except that submitters of information may not be as quick to capitulate on the issue and, to further complicate matters, proposals to revise the federal criminal code including section 1905 have been introduced in Congress and may some day be enacted. Until that day, an examination of the predecessor statutes may prove instructive.

The last version of 15 U.S.C. § 176b (1940) prior to codification forbade employees of one agency, the Bureau of Foreign and Domestic Commerce, from disclosing statistical information which had been furnished in confidence. Such data was to be used only for statistical purposes. The statute contained no criminal sanctions and no exception for disclosures "authorized by law" as did the other two predecessor statutes and section 1905. The last version of 18 U.S.C. § 216 (1940) prior to codification protected information on a manufacturer's operations, style of work, and apparatus garnered by an official visit of any government employee, and also any information contained in income tax returns. Section 1905 protects data on operations, etc., even though not acquired during an official visit, and financial data even though not contained in a tax return. The last version of 19 U.S.C. § 1335 (1940) prior to codification forbade disclosure of trade secrets or processes uncovered by a Tariff Commission investigation. Section 1905 protects trade secrets and processes regardless of the vehicle by which they come to the government's attention.

Mr. Clement and the Department of Justice have employed a rule of statutory construction which presumptively applies the scope of predecessor statutes even when the language of a successor codification differs, unless there is evidence of legislative intent to affect a change. Since the Reviser's Notes contain no hint of a congressional intent to broaden the reach of the three statutes in question, the conclusion proffered is that the

broadened language of the codification should be ignored and section 1905 read as though the three statutes have been resurrected. This conclusion is persuasively drawn by Mr. Clement. However, a codification is not necessarily limited to merely collecting the law or to restating it in some improved form. A codification may involve reexamination and revision of the law. Rules of construction are merely aids employed to ascertain the intent of the lawgiver. There are many such aids, some of which could be drawn upon by a court to dispose of the current issue. To illustrate, the following list outlines some of the relevant rules of construction: (1) If ambiguity surfaces in a codification, a continuation of prior law may be presumed. But absent ambiguity and uncertainty, a codification is construed without resort to seminal statutes. (2) Rules of construction generally operate only in areas of ambiguity and uncertainty. They do not operate in the face of clear expression. Rules of construction, after all, are employed to remove doubt, not create it. (3) If the codification language fairly admits of a construction consistent with former law, no change is presumed. However, the language of codification may compel a conclusion of change. Where a material or substantial change in wording has occurred and where the revised language cannot bear the same construction as the seminal statutes, then the revised language is not to be denied but given effect, even in the absence of explanation in a reviser's note. (4) The lawgiver is presumed to understand the meaning of the words used, the words are presumed to be used with a purpose, and the words must be given force and effect. (5) The plain and obvious meaning of words is preferred to hidden, narrow meanings.²⁹¹

One or more of these rules of construction could be used to deny the conclusions drawn by Mr. Clement. There is no guarantee that courts and commentators will revise their perception of the Trade Secrets Act. One commentator, for example, exploring the same ground as Mr. Clement, reached

the opposite conclusion:

The three prior sections (of 18 U.S.C. § 1905) have dealt with tax records, tariff-related information, and customs information. When Title 18 was revised in the late 1940's a consultant staff of the American Bar Association and West Publishing Company representatives participated with the Department of Justice in drafting the new code. Outside of revisers' notes which cite the sections merged and refer to minor changes in "translations and phraseology," no legislative history has been found for the section in federal, ABA, and West libraries In the absence of legislative history or revision, and with scant judicial interpretation of the scope of its terms, a broad reading of the listed categories might be most appropriate to effectuate the apparent purpose of the statute.²⁹²

Without benefit of any rules save perhaps the one which suggests that clear language not be obfuscated, courts have similarly construed section 1905 broadly. The recent Supreme Court opinion in Chrysler considered in some depth the statutory origins of Section 1905, including the legislative histories of the predecessor statutes and the variance in language between these statutes and section 1905. The Court did not conclude that the narrower construction controlled²⁹³ but instead intimated that the scope of exemption four and that of section 1905 are more similar than dissimilar.²⁹⁴ The Chrysler case was remanded in order for the Third Circuit to determine whether the contemplated disclosure would violate section 1905.²⁹⁵ If the narrower statutes govern, then it would appear that data on Chrysler's affirmative action program and work force composition may be disclosed by the agency. Title 15, Section 176b (1940) encompassed only data to the Bureau of Foreign and Domestic Commerce. In Chrysler, the data was being provided to the Defense Logistics Agency, the compliance agency for the Secretary of Labor's Office of Federal Contract Compliance Programs. Title 18, section 216 (1940) encompassed only information on tax returns and data on operations, style of work and apparatus gleaned during an official government visit. Title 19, section 1335 (1940) encompassed trade secrets and processes surfacing during a Tariff Commission investigation. Thus, it would appear

as a matter of law, section 1905 would not reach the data at issue in Chrysler, so long as the predecessor statutes are given life.

If the courts have erred in applying the plain language of section 1905, Congress has ignored the error. Congress has not hesitated in the past to use remedying legislation to override court decisions on the Information Act,²⁹⁶ but has not yet corrected court decisions which have broadly construed section 1905. Perhaps there is reluctance to replace the very broad language of section 1905 with language which protects only the records of one government bureau and one government commission and data found on one government form. The value of a codification is diminished somewhat if a consolidation must be accompanied by an annotation which reprints the three superceded statutes for the purpose of guiding statutory interpretation. From a policy standpoint it might also be argued that certain categories of data should warrant protection without regard to the agency involved or the particular government form on which the data is found. Interestingly enough, if the narrow predecessor statutes control, then perhaps courts which previously considered section 1905 too broad to be an exemption three statute will reconsider.

Perhaps the answer to a legislative issue is clarifying legislation. The Federal Criminal Code Reform Bill of 1977 was passed by the Senate early in 1978,²⁹⁷ but ran into difficulty with the Subcommittee on Criminal Justice and its parent committee, the House Judiciary Committee. The revision of section 1905 was not one of the more controversial portions of the bill, so it is possible that any federal criminal code enacted in the future will contain provisions the same as or similar to those in the rejected bill. Section 1905 was to be replaced by a section 1525, which provides as follows:

(a) OFFENSE.--A person is guilty of an offense if, in violation of a specific duty imposed upon him, as a public servant or former public servant by a statute, or by a regulation, rule, or order issued pursuant thereto, he discloses information to which he has or had access only in his capacity as a public servant, that had been provided to the government by another person, other than a public servant acting in his official capacity, solely in order to comply with:

- (1) a requirement of an application for a patent, copyright, license, employment, or benefit, or
- (2) a specific duty imposed by law upon such other person.

(b) GRADING.--An offense described in this section is a Class A misdemeanor.

(c) JURISDICTION.--There is federal jurisdiction over an offense described in this section if the public servant or former public servant acquired the information as a federal public servant.²⁹⁸

The term "public servant" is broadly defined to include an officer, employee, adviser, consultant or other person authorized to act for the government, including persons elected or appointed to office.²⁹⁹ Submitters may qualify for protection if they voluntarily submit information for a patent, copyright, license, employment, or benefit, or if any law mandates involuntary submission. The proposed statute forbids disclosure in the face of a nondisclosure statute or regulation "issued pursuant thereto." The present section 1905 forbids disclosure unless an authorizing statute or regulation permits it; the proposed section 1525 forbids disclosure only if a more specific nondisclosure statute or implementing regulation also prohibits it. With section 1905, if Congress does not act, disclosure is forbidden. With section 1525, if Congress does not act, disclosure is permitted. Section 1905 is disclosure by exception; section 1525 is withholding by exception. Section 1525 appears similar to exemption three of the Information Act. Neither is self-executing; both require nondisclosure statutes to give life to their provisions. Interpretation of the present Trade Secrets Act is in the hands of the federal courts; modification of the Trade Secrets Act and Federal Criminal Code awaits Congress.

CHAPTER FOUR

THE BUSINESS RECORDS EXEMPTION

Most of the stuff we get isn't worth a damn. But the act is like an old fishing hole. You throw out a line. Usually you come up with an old tire or a shoe. But now and again you come up with a fish.³⁰⁰

Trade secrets and confidential business information are exempt from mandatory disclosure under exemption four. The language of the Act reaches "trade secrets and commercial or financial information obtained from a person and privileged or confidential" ³⁰¹ Prior to the era of the Information Act, business data in the hands of the government enjoyed a degree of protection second only to that found at the company plant. Business data was generally used by the government internally with disclosure limited to innocuous material or to data in summary form. Private industry is probably less certain today that the government can keep a secret. Criticism of the Information Act and of agency administration has been received from segments of the business community. One spokesman noted that

The act has been employed by competitors, analysts, investors, disgruntled employees, potential and existing adverse litigants, self-styled "public interest" groups, foreign businesses and governments and a wide variety of others to obtain information concerning private businesses which, but for the FOIA, would not be available to them The use of the FOIA for such surveillance of private affairs was not intended by Congress and needs to be remedied.³⁰²

The Information Act's use for "surveillance" purposes was inevitable. Some years ago a firm valued a set of stolen financial plans at one million dollars and another firm estimated that some 160 million dollars in sales were lost when designs for a new piece of computer equipment somehow found their way into the hands of a competitor.³⁰³ The Information Act has

apparently joined the parabolic microphones which pick up conversations a hundred yards away and the martini olive (transmitter) on a toothpick (antenna).³⁰⁴ Companies who pirate employees to gain information will not hesitate to use the Information Act to try to secure valuable business data.³⁰⁵ The authors of the Information Act would probably not have predicted the following distribution of Food and Drug Administration requesters:³⁰⁶

Industry	44%
FOI Service Companies	42
Public Interest Lawyers	8
Trade Publications and Press	2
Other	4

Though this analysis was conducted on 1975 figures, there is no reason to suspect a shift in the distribution. If 86 percent of requests come from business and the agents of business, as the FDA believes, some legitimacy is lent to the argument that the Information Act is being used primarily as an "Industrial Espionage Act." Public interest groups are unimpressed with this perception. One fervent response is that "trade secrecy is a tool for producers that has served to hide a range of ills until the harmful consequences burst forth in a torrent of human pain and misery."³⁰⁷ This viewpoint may be addressed to agencies such as the FDA and EPA, but what about non-regulatory agencies? Is the original purpose of the Information Act well-served when firms request, for example, component-by-component pricing schedules; negotiated cost, profit, prices, and general and administrative expenses; income statements and balance sheets; and valuable technical data?³⁰⁸ The answer is complex. In the first place, a mere request does not necessarily result in disclosure or an expensive reverse-FOIA lawsuit to protect business records. In the second place, some data considered sensitive by submitters does indeed pertain to the functions, operations, and activities of the government, the ostensible reasons behind the Information Act. The House Committee on Government Operations is sympathetic to the complaints of

submitters of business information, but clearly in no mood to provide any statutory relief:

Information received from contractors or builders shows what the Government is purchasing, what it costs, and how the procurement process functions. Equal employment opportunity data submitted under Federal requirements provides a way to measure the effectiveness of the Government's EEO programs. While this and other information about the interrelationships between business and Government is revealing about business activities, it is also revealing about Government activities and therefore of legitimate public interest.³⁰⁹

Presumably the Information Act could be used to expose errors in the acquisition process, bad judgment, abuses of discretion, waste, corruption, and fraud. Proponents of the status quo wish to retain exemption four in its present form in order to preserve the potential for policing the government acquisition function. To the extent the Information Act is misused, such proponents would rely on the safeguards presently available to protect trade secrets and confidential business information. These safeguards will now be examined.

Trade Secrets

The Attorney General's 1967 Memorandum outlined several ways the literal language of exemption four could be construed.³¹⁰ Some early judicial interpretations of exemption four carved out a category for "privileged or confidential" data which was independent of "trade secrets" and "commercial or financial" information.³¹¹ A more restrictive construction views "privileged or confidential" as descriptive of "commercial or financial information", preserving the latter and "trade secrets" as two independent categories.³¹² This view has survived. Thus, today exemption four embraces

- (a) Trade secrets, and also
- (b) Commercial or financial information which is obtained from a person and which is privileged or confidential.³¹³

Trade secrecy is a common law concept. The starting place in its definition is generally the Restatement's analysis of the common law:

A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process for manufacturing, treating, or preserving materials, a pattern for a machine or other device, or a list of customers.³¹⁴

The Supreme Court recognized the Restatement's view in a 1974 case³¹⁵ and the District Court for the District of Columbia adopted the Restatement definition in a 1976 Information Act case.³¹⁶ The Restatement's definition is broad enough to include commercial information, and does, in fact, cite a "customer's list" as an example of a trade secret. Similarly broad is the definition contained in the proposed Uniform Trade Secrets Protection Act:

"Trade secret" means any formula, pattern, device or compilation of scientific, technical, or commercial information which the trade secret owner has taken reasonable precautions to maintain in secrecy so that except by improper means there would be difficulty in acquiring it, and which gives said owner an opportunity to obtain an advantage over others who do not know or use it.³¹⁷

However, one of the early Information Act cases enunciated a somewhat narrower definition of trade secrets: "An unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities."³¹⁸ The Restatement's customers list would probably fall short of this definition. The competition between trade secret definitions was at issue in a recent Information Act case before the District of Columbia District Court. In Martin Marietta Corporation v. Federal Trade Commission³¹⁹ a deposition taken by the FTC contained information on the firm's plant locations, types of cement sold, estimates of plant life, percentages of cement sold to various customers, storage capacity of plants, plant production, cement shipments, percentage of markets, freight absorption, and profitability figures.³²⁰ The Arizona Attorney General's Office had made an Information Act request for the deposition as part of an antitrust investigation. The FTC was disposed to release the deposition over Martin

Marietta's objection. The court observed that the Federal Trade Commission Act provided the FTC with the power to disclose information, ". . . except trade secrets and names of customers."³²¹ Thus, if the data outlined above constituted trade secrets the court believed that both the Federal Trade Commission Act and the Trade Secrets Act forbade disclosure. If, however, the data did not rise to the level of trade secrets, then the Federal Trade Commission Act authorized disclosure and constituted the "authorization by law" to satisfy the Trade Secrets Act. Like the Information Act, the Federal Trade Commission Act does not define a "trade secret." As might be expected, Martin Marietta argued that the broad Restatement definition should be employed. The same court in the earlier Ashland Oil, Inc. v. Federal Trade Commission decision did employ the Restatement definition, declaring that an oil company's reserve estimates for natural gas leases and contracts on federal lands were trade secrets.³²² Similarly, in Exxon Corporation v. Federal Trade Commission, the court determined that data concerning the projected yield of individual uranium mines constituted trade secrets.³²³ Nevertheless, in Martin Marietta the district court found that the production, shipment, pricing, and customer and marketing data contained in the requested deposition did not rise to the level of trade secrets.³²⁴ The Restatement test was rejected as being too broad. If a trade secret was merely any information used in a business, unknown to competitors, which provided an "opportunity to obtain an advantage over competitors . . .,"³²⁵ then there would be no need to write into the Federal Trade Commission Act that customer lists as well as trade secrets will not be disclosed. There would be no reason in the Trade Secrets Act to list other data in addition to trade secrets which is forbidden to be disclosed. Most importantly, there would be no reason to exempt commercial and financial data as well as trade secrets in the Information Act, if the latter could embrace the former. The court in Martin Marietta

followed a line of cases wherein a less expansive definition has prevailed. In these cases the following have been denied the trade secret label: costs of production;³²⁶ data on suppliers' capacities, pricing policies, and names and requirements of customers;³²⁷ and data on profits and costs, names of persons known to be customers in industry, and production techniques employing generally available technology.³²⁸

Similarly, the court in Consumers Union of the United States v. Veterans Administration employed a definition which emphasized the elements of secrecy, commercial value, and essentially technically-oriented data, as opposed to commercial or financial data.³²⁹ The House Committee on Government Operations has advised that this definition appears to be "more suitable for FOIA."³³⁰ Facially, there would appear to be an advantage to designation as a "trade secret," since commercial and financial data must also be "confidential" to be eligible for protection from disclosure. However, the factors considered under either the Restatement definition or a less expansive definition limit the practical advantage of trade secret designation. Essentially a trade secret must be both "valuable" and "closely held." The Restatement's factors used to evaluate data for the status of trade secrets are as follows:

- (1) The extent to which the information is known outside of the business;
- (2) The extent to which it is known by employees and others involved in the business;
- (3) The extent of measures taken to guard the secrecy of the information;
- (4) The value of the information to its owner and to all competitors;
- (5) The amount of effort or money expended in developing the information; and
- (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.³³¹

Data unable to meet the test for confidential commercial information described in the next section will probably be unable to satisfy the "value" and "secrecy" factors requisite for trade secret designation. It has been suggested that the answer to unfavorable confidentiality rulings is to argue

trade secrecy.³³² However, little solace will be found in this tactic both because courts will probably not view true commercial and financial data as trade secrets but also because an inability to demonstrate that disclosure will produce "substantial competitive harm" will in practice translate into an equivalent failure to demonstrate that data is both secret and commercially valuable.

In the federal acquisition process, trade secrets may be found in a number of documents submitted to the government. Trade secrets (as well as commercial and financial information) may be found, for example, in Independent Research and Development (IR&D) program submissions, technical proposals, invention disclosures, and final technical reports.

The Defense Acquisition Regulation requires that contractors which receive more than two million dollars annually in IR&D and bid and proposals costs will negotiate an advance agreement with the Department of Defense.³³³ The contractor submits a technical plan on its IR&D program which is reviewed for potential military relevancy and for reasonableness and technical quality. The plan will contain information on IR&D projects, including inter alia, the overall technical approach; methods, techniques and design approaches; specific tests and equipment; theoretical work being conducted; and progress made on the project during the past year. The Department of Defense form for IR&D data contains the following legend:

Furnished in confidence and subject to exemption under Subsection (b) of 5 U.S.C. 552. The information contained herein is the property of the company identified in Item 6 below; is furnished for the sole purpose of identifying the subject program and shall not be disclosed other than to duly authorized DOD personnel. Any authorized reproduction or disclosure of the information contained herein, in whole, or in part, shall include this notice.³³⁴

The technical data contained in the IR&D program disclosure arguably satisfies even the narrow definition of trade secrets noted above by virtue of being unpatented, secret, commercially valuable, and being a "plan, appliance,

formula or process, which is used for the making, preparing, compounding, treating or processing of articles and materials which are trade commodities."³³⁵

Similarly, unsolicited technical proposals may contain closely held, commercially valuable technical data exempt from mandatory disclosure as trade secrets. In order to protect trade secrets, and confidential commercial and financial information as well, the Defense Acquisition Regulation provides that the following legend will be placed on unsolicited proposals:

All Government personnel handling this proposal shall exercise EXTREME CARE to insure that the information contained herein is NOT DISCLOSED outside the government and is NOT DUPLICATED, USED, OR DISCLOSED in whole or in part for any purpose other than to evaluate the proposal, without the written permission of the offeror"336

Unsolicited proposals, as well as those submitted pursuant to a request for proposals (RFP), are eligible for yet another restrictive legend providing for nondisclosure outside the government:

This data . . . shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; provided, that if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction.³³⁷

The Defense Acquisition Regulation explicitly subordinates the policy enunciated in the restrictive legend to the Information Act.³³⁸ Nonexempt data must be disclosed on request, but the Information Act is inoperable as to exempt data. Thus subordination of the markings to the FOIA would not be mandated for exempt data. In any case, it is clear that technical proposals will receive close scrutiny for trade secrets prior to release. Unclassified contracts are often deemed "public documents" releasable upon request, but certain contracts may contain trade secrets if all or part of technical proposals are incorporated into the contract.

Research and Development contracts will contain a patent rights clause requiring written disclosure to the government of new and useful processes and devices which may be patentable. Such disclosures are not the patent applications themselves. The latter are protected under the Patent Act, which provides that "applications for patents shall be kept in confidence by the Patent and Trademark Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner."³³⁹ Invention disclosures consisting of detailed technical data which is maintained in secrecy and is valuable may be protected as trade secrets. However, if the invention is publicly used or disclosed, such that the twelve month period of the statutory bar³⁴⁰ is running, disclosure pursuant to an Information Act request would be in order.

Final technical reports may be a deliverable item under R&D contracts. It may be desired that such reports contain no proprietary data so that they may be forwarded to the National Technical Information Service for unlimited public distribution. However, if trade secrets proprietary to a contractor are desired in a technical report and limited publication is acceptable to the government, the report will be used internally within the government. Segregable trade secrets material in the final technical reports may be exempted from mandatory disclosure under exemption four.

Trade secrets contained in technical proposals may find protection under exemption four, but there is less certainty that counterpart data in grant applications will be similarly treated. Government grant programs are generally available to non-profit universities and research centers. The grant application will contain data analogous to that contained in technical proposals, including research designs, proposed methods, and specific aims for specific projects. The District of Columbia Circuit Court, in Washington

Research, Inc. v. Department of Health, Education and Welfare,³⁴¹ considered whether a scientist's research design submitted in a grant application should be afforded protection under exemption four. At issue was data associated with sophisticated research projects approved and funded by the National Institute of Mental Health. The court ordered disclosure, emphasizing the terms "trade" in trade secret and "commercial" in confidential commercial data: "It is clear enough that a non-commercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce."³⁴² The court recognized that premature disclosure of research designs may have an adverse impact on the noncommercial scientist's career advancement and professional recognition and rewards, but determined that such interests were not trade or commercial interests.³⁴³ This holding no doubt surprised noncommercial scientists and their nonprofit institutions who find themselves in competition for a finite amount of grant research dollars and who use grant dollars to pay salaries, buy equipment, and keep the lights turned on. However, the court was within its rights to construe exemption four narrowly. Congress could provide protection to grant research data which would fall into exemption four if submitted by a profit-seeking corporation,³⁴⁴ but has declined to do so. The Administration, through Senator Robert J. Dole, proposed that the 1974 Amendments to the Information Act contain protection for the scientific and technical portion of research designs submitted by noncommercial scientists.³⁴⁵ The proposal was largely ignored. The House Committee on Government Operations is aware of the issue and the criticism of the Washington Research opinion,³⁴⁶ but has declined to make recommendations, calling instead for further study.³⁴⁷ The issue is a proper one for relitigation in other cases, this time with evidence and emphasis on the "commercial" value of sophisticated research designs.³⁴⁸

If data submitted to the Government by a profit-seeking firm fails to qualify as a trade secret, a submitter or agency may alternatively argue that it represents confidential commercial or financial information. This is the subject of the next section. However, as noted above, if data is not valuable enough or not held closely enough to qualify as a trade secret, a submitter may have difficulty meeting the currently employed judicial test for the confidentiality of commercial data.

Commercial or Financial Data

Commercial or financial data broadly relates to a firm's business affairs. The legislative history of the Information Act placed "business sales statistics, inventories, customer lists and manufacturing processes"³⁴⁹ into this category. Customer lists, it will be recalled, are cited by the Restatement as an example of information which could qualify as a trade secret.³⁵⁰ For that matter, manufacturing processes could be viewed as trade secrets.³⁵¹ The Restatement attempts to distinguish between trade secrets and other business information, describing the latter as

(I)nformation as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the data fixed for the announcement of a new policy or for bringing out a new model or the like.³⁵²

In practice courts have broadly categorized data as commercial or financial data. The following list demonstrates the diversity of such records:

Balance sheet data including cash in banks and on hand, marketable securities and investments, notes and accounts receivable, prepaid expenses, fixed assets and accumulated depreciation (including location, date acquired, useful life, cost, accumulated depreciation and book value), notes and accounts payable, mortgages and long-term liabilities, accrued liabilities, names of partners or stockholders and percentage of ownership or holdings; operating data including income, deductions, taxes, expenses, statement of net worth, breakdown of gross profits, salaries of owners, partners, officers, directors; and description of all projects existing or planned for the following year by location, cost and occupancy capacity.³⁵³

Business sales statistics and tax data³⁵⁴

Financial reports³⁵⁵

Cost reports including income received, balance sheets, profit and loss statements, occupancy rates, cost breakdowns³⁵⁶

Production procedures, overhead and operating costs, levels of profit (profit margins), sales and pricing data³⁵⁷

Sales statistics including market shares, sales amounts, profit levels³⁵⁸

Unsuccessful cost proposal including prices of components and their maintenance and rental costs³⁵⁹

Bid information including pricing and software configuration³⁶⁰

Cost proposal³⁶¹

Bid proposal, including customer list, design concepts, perceptions of problem areas, recommendations, and biographical data on key employees³⁶²

Unsuccessful cost proposal, including information on pricing and discount practices for approximately 200 component parts³⁶³

Bid information including details of pricing and software configuration³⁶⁴

Cost Accounting Standards disclosure statements, including cost accounting principles, practices and methods (such as the method of distinguishing direct from indirect costs, the basis used to allocate indirect costs, and the underlying formula upon which bid and cost estimates were submitted³⁶⁵

Equal employment opportunity data³⁶⁶

Medicare cost reports³⁶⁷

Television station annual financial reports³⁶⁸

Joint venture agreement³⁶⁹

Customer and supplier lists³⁷⁰

Novel construction configuration³⁷¹

Credit related information³⁷²

The decision to disclose or withhold commercial or financial data is not always predictable. Only confidential (or privileged) data is exempt from mandatory disclosure by exemption four. However, the test for confidentiality has not been static. The same business data which was declared exempt in 1970

may or may not be similarly treated in 1980. The test for confidentiality which is universally embraced by courts today was enunciated by the District of Columbia Circuit in 1974.³⁷³ The test is such that the same business data found in different fact situations could conceivably be declared exempt in one situation and nonexempt in the other. Perhaps the best illustration of this point is the 1974 case itself which established the current test for confidentiality. Seven submitters had provided the Department of Interior with the same commercial and financial data. The data of five submitters satisfied the test and was deemed exempt. The cases of the remaining two submitters were reversed and remanded for reconsideration.³⁷⁴ Time is another variable. Data may be confidential today, and of no consequence next year. Finally, even if data is considered to be within exemption four, agencies may have discretion to disclose it. Agency discretion is exercised by individuals with varying experience with the Information Act, and with varying sensitivities to the interests of requesters and submitters. As a result of all of these variables, a degree of unpredictability is inherent in agency responses to a FOIA request.

Early Confidentiality Tests

As noted above, the legislative history of the Information Act provided examples of the types of data deemed to be exempted under exemption four. The House and Senate Reports specifically cited business sales statistics, inventories, customer lists, manufacturing processes, privileged information, and technical or financial data submitted to a lending agency as falling within exemption four.³⁷⁵ One issue that arises is whether any of the cited data enjoys a per se exemption. Case law, particularly since 1974, would answer in the negative. Today the customer list and sales statistics and the other data favored by congressional mention in 1965 and 1966 must line up with

sundry uncited types of data and be measured by the standard handed down by the District of Columbia Circuit Court of Appeals in 1974.³⁷⁶ It is arguable that Congress intended such records to be per se exempt, but critics will point to the deficiencies and confusion in the legislative history, ascribing mere "potentially exempt" status to the cited examples. Critics of the per se test may also ask why Congress, which has acted with alacrity to modify other judicial decisions on the Information Act, has failed since 1974 to modify the test for confidentiality. Other tests of confidentiality enjoyed some use prior to being superceded, or submerged into, the District of Columbia's 1974 test. One early test was drawn from a 1966 House Report on the Information Act:

(Exemption four) would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.³⁷⁷

This sentiment may be heard even today and subscribed to by many citizens, but did not survive long as an exemption four test.³⁷⁸ For if a mere promise of confidentiality between agency and submitter will insulate data from disclosure, unfettered discretion is vested in the agency and the submitter to determine which data will escape the reach of the Information Act. As the District of Columbia Circuit Court of Appeals wrote in Petkas v. Staats, "Nor can a promise of confidentiality in and of itself defeat disclosure."³⁷⁹

Another early test was drawn from the language of a 1965 Senate Report on the Information Act: "(Exemption four) is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained."³⁸⁰ Thus, if data was customarily closely held by a submitter, merely placing it in the hands of an agency would not alter that practice. The difficulty with this "expectation of confidentiality" test is that federal disclosure policy would

be dictated by the divergent disclosure practices of sundry submitters. The House Committee on Government Operations has expressed its disfavor of using even an industry standard to define disclosure practices.

The expectation of confidentiality test is inadequate even if made more general by asking whether a reasonable business enterprise would customarily release the information. Any test based on actual business policies for the release of information will prove to be inadequate because of the widespread practice of withholding information whether or not there is a legitimate reason for the withholding.³⁸¹

One issue is just what constitutes a "legitimate reason" for nondisclosure. My rationale is of course legitimate, yours is questionable, and theirs is tantamount to a repeal of the Information Act. The House Committee has observed that predictions of harmful consequences of disclosure "are often exaggerated" and that documents routinely withheld in the past are now "routinely released without damage."³⁸² Nevertheless, some submitters are willing to invest heavily in litigation costs to protect data which agencies and requesters feel free to disclose. Little solace should be taken in the fact that much of the business community today appears to acquiesce in agency decisions to disclose. For the submitter will weigh the value of the data about to be disclosed (or the harm which will emanate from its disclosure) against the expense of a reverse-FOIA suit, the probability of success at the federal district court level, and the potential for defending or petitioning at the appellate level. The history of Chrysler Corporation v. Brown³⁸³ is a case in point. It was filed in the United States District Court in Delaware. The 1976 Delaware decision³⁸⁴ was appealed to the Third Circuit Court of Appeals. That 1977 decision³⁸⁵ was reviewed by the Supreme Court in 1979, vacated and remanded to the Third Circuit. The Third Circuit vacated and remanded to the Delaware District Court.³⁸⁶ This three-year legal odyssey cannot be indulged in by all firms for all data. General acceptance of disclosure may be more a tribute to today's ballooning litigation costs than

to the concept that formerly withheld corporate documents need never have been withheld in the first place and can be released today without undue damage to the submitter. In the final analysis, large or successful businesses will generally pass Information Act litigation costs on to the consumer; small or marginal businesses will generally suffer disclosure in silence.

The National Parks³⁸⁷ Decisions

In 1974 the District of Columbia Court of Appeals enunciated the test which was to supplant the "promise of confidentiality" and the "expectation of confidentiality" tests. It has become known as the "substantial competitive harm" test. At issue was financial data submitted by concessions operated in the national parks, including audits and annual financial statements. In defining confidentiality, the court searched for the legislative purposes underlying exemption four. The first purpose discussed by the court was the need of government policymakers to have access to business information: "Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired."³⁸⁸ The second legislative purpose underlying exemption four was identified as protecting submitters of business information from the competitive disadvantages of disclosure.³⁸⁹ Both purposes are characterized by the court in this classic statement of the National Parks test:

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.³⁹⁰

The district court in National Parks had employed an expectation of

confidentiality test and opted for nondisclosure. The circuit court remanded the case so that the district court could ascertain whether disclosure posed instead the likelihood of substantial competitive harm.³⁹¹

The deficiencies of the legislative history of the Information Act have been exhaustively examined and reported by Professor Kenneth Davis. Professor Davis outlined the difficulties of the legislative history in this analysis:

The most important fact about the legislative history is that no explanation appears for the addition to the fourth exemption of the words "commercial or financial." The 1964 version of the bill (S. 1666) provided for exemption of "trade secrets and other information obtained from the public and customarily privileged or confidential." That version was passed by the Senate, but the House did not act, and when the bill (S. 1160) was introduced in the 89th Congress, two changes had been made: The word "customarily" was deleted, and the words "commercial or financial" were added.

Not only was no explanation ever made for the addition of the words "commercial or financial," but both the Senate committee and the House committee in their reports seem to read the words "commercial or financial" as if they were not there.

.....

But the discrepancy between the statutory language and the (legislative) reports turns out to be a mere inadvertence. The Senate committee simply failed to alter its earlier report, based on the earlier bill without the words "commercial or financial." And the House committee seven months later copied most of the Senate committee report.³⁹²

In spite of such difficulties with the legislative history, the National Parks court devined as a legislative purpose of the Information Act the continued and full cooperation of those who voluntarily submit data to the government. If the voluntary contribution of data is chilled then the government will presumably have less information on which to base its decisions. The caveat is that if submitters are required to provide data then the court believed disclosure will not impair the flow of that information to the government. In National Parks the submitters were required, as licensed concessionaires in the nation's parks, to provide detailed financial information, so the "impairment" test was not fulfilled and the data in question was measured against the "substantial competitive harm" test instead.

If firms desire to contract with the government or are strictly regulated by government agencies, data may be extracted by statute and regulation from reluctant submitters. Thus, the first National Parks test has largely been ignored. Litigation has focused on its sister test. Part of the reason may be that the government today does not generally rely on good will and cooperation for information it deems necessary. In the federal acquisition process, for example, sensitive data is submitted as a condition of obtaining government contracts, from technical proposals to cost or pricing data to equal employment opportunity data. A second reason for the disuse of the "impairment" test is that the government is the only party which has "standing" to raise the issue. If the government is so unconcerned about chilling future submissions that it decides to disclose data, then a reverse-FOIA submitter will have difficulty relying on the "impairment" test. The government has simply waived the argument.³⁹³

In spite of the wide disuse of the "impairment" test in litigation, at least one thoughtful court has suggested a renewed role:

(W)hen the Government lacks the means to compel strict enforcement, it would be unrealistic to hold that a mere legal obligation sufficiently protects the Government's interests in collecting the relevant data. This sort of legal fiction should not be allowed to interfere with the smooth functioning of the Government. Thus, a statutory obligation to provide the Government with information is only a factor for the Court to consider in determining whether or not disclosure will impair the Government's ability to gather the data.³⁹⁴

This is a practical view. Firms with exclusive or significant federal business will remain reluctant submitters of data deemed sensitive. It would be unfortunate if firms with marginal federal business left the federal arena to protect data, if other firms curtailed federal business, and if firms contemplating a foray into the federal marketplace postponed such activity. It would be similarly unfortunate if contractors were to reduce the amount of data submitted to agencies due to fear of disclosure. An informal study has

suggested that aerospace contractors are in fact withholding some state-of-the-art technology from technical proposal submissions, ostensibly to prevent its disclosure under the Information Act.³⁹⁵ The nine contractors which do the largest dollar volume of business with Air Force Systems Command were queried as to the impact, if any, of the potential for disclosure. The conclusion drawn was that

The FOIA has effected the amount of the state-of-the-art technology contractors are willing to include in their technical proposals. Several contractors indicated that the threat of a FOIA request for their proposals has resulted in their withholding some of their sensitive (competitive) technology.³⁹⁶

Such contractor survey responses must be evaluated with caution. They have the potential for being self-serving and are designed to promote a practice of nondisclosure at the agency level. Furthermore, contractors have an interest in disclosing at least enough information to demonstrate technical superiority since in negotiated R&D acquisitions, awards are not always made to the contractors submitting the lowest dollar offers. Nevertheless, the study conclusions are bothersome. Contractors perceiving a FOIA threat to their proposals have an interest in leaving as much sensitive data as possible at the company plant.

The second purpose of exemption four, which has been the subject of considerable litigation, is that which withholds data to prevent substantial competitive harm to the submitter. In deriving this test, the District of Columbia Circuit Court of Appeals examined at some length the legislative history of the Information Act. Of particular interest to the court were selected witnesses who provided testimony at committee hearings. The court noted the testimony of representatives from the National Association of Broadcasters, the Treasury Department, the Department of Justice, and the Rural Electrification Administration.³⁹⁷ These four witnesses observed that nonexempt business data could be "exploited" by competitors and disclosure

would provide an "unfair advantage" to competitors.³⁹⁸ After recounting this testimony the court fashioned the test in question. There is some danger in fashioning a test based on selected witnesses. In the first place, if these very witnesses had been asked if the exemption four test should be the "likelihood of substantial competitive harm," they may well have dissented. If such a test were outlined, the four witnesses might well have responded with a few questions of their own for the subcommittee, such as

Why is this test so rigorous? Why must a firm be required to prove by a preponderance of the evidence the likelihood of substantial harm? What happens to the information which is merely useful to a competitor? What happens to current industry disclosure practices? What happens if the government promises confidentiality?

If these issues had been probed, it is suspected that the National Parks court would have testimony unsuitable as a warrant for the substantial competitive harm test. Furthermore, legislative history "by witness" is a function of the witnesses that appear. What would have been the impact of testimony by a noncommercial research scientist, pointing out that his research design is just as important and valuable and deserving of protection as a counterpart design submitted by a commercial firm? If the subcommittee had sympathized with the scientist, would the District of Columbia Circuit Court in Washington Research Inc. v. HEW³⁹⁹ have come to the opposite conclusion (protecting such research designs) based on "legislative history"? Such testimony certainly does not require much imagination. There is danger in fabricating tests based on who shows up to testify and who does not. Of course, the court in National Parks also relied on House and Senate reports, but those reports suggested that the proper tests should be the "per se," "promise," or "expectation of confidentiality" tests discussed above and dismissed by the District of Columbia Circuit Court.

One possible motivation for the National Parks test is the judicial preference for objective tests. The District of Columbia Circuit Court of

Appeals prefaced its derivation of the two exemption four tests with these words, "We have made it clear . . . that the test for confidentiality is an objective one."⁴⁰⁰ The same affirmation was repeated in Petkas v. Staats three months later.⁴⁰¹ In each case an earlier circuit court decision, Bristol-Myers Co. v. FTC,⁴⁰² was cited. The seeds of National Parks are found in Bristol-Myers, decided four years earlier:

(Exemption four) serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers. Nevertheless, the statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny. The District Court in the first instance has the responsibility of determining the validity and extent of the claim, and insuring that the exemption is strictly construed in light of the legislative intent.⁴⁰³

In spite of the advantages of an objective test, Congress may provide for a subjective test if it so desires. It may be argued that the language drawn from the Information Act's legislative history supporting the promise of confidentiality and expectation of confidentiality tests is supportive of a subjective, as opposed to an objective, test. However, if an objective test is deemed vital, then a test equally consonant with the Act's legislative history is to ascertain industry disclosure practice, and if nondisclosure of the data in question is customary, to let that "objective" response drive the Information Act disclosure decision. Such a test would embrace the concern for competitive harm expressed by the witness testimony which the National Parks court deemed important. Data useful to competitors is customarily not disclosed. Such a test would not leave disclosure to the subjective whim of a firm out of step with the disclosure practices of the rest of an industry. Such a test would recognize that when the Information Act and its legislative history became law, part of the framework was the disclosure practices of industry. It was against this backdrop that Congress expressed a desire to allow that which had customarily not been released to retain that status. The Information Act was not designed to promote the wholesale disclosure of

private business information.

However, an "objective" test using an industry standard will find little support today outside the boardroom. The problem is that a subjective test, or an objective test using an industry standard, simply produces too little data for the proponents of Open Government. The business world customarily played its cards close to the chest; a "substantial competitive harm" test is going to be necessary to take a peek at the hand. The attitude of those who favor broad disclosure practices was perhaps revealed in a recent district court case.⁴⁰⁴ At issue were Medicare cost reports. The Department of Health, Education and Welfare had promulgated a regulation providing for their disclosure. The court observed that

If the HEW regulation which required disclosure of cost reports is valid (and they were), the same information about all hospital providers will be equally accessible to everyone. In other words, every hospital will have equal access to the cost information about its potential competitors. Where every member of the relevant competitive market is affected similarly, it is somewhat specious theoretically to argue that a change from unavailable, to equally available, information is anticompetitive.⁴⁰⁵

This line of reasoning, wedded to the substantial competitive harm test, and carried to its logical extreme, would emasculate exemption four. One suspects that the proponents of disclosure carry with them the kernel of this philosophy, which translates roughly into "universal disclosure equals competitive stalemate." If this particular philosophy of disclosure plus construction of an exemption four test designed to destroy pre-1966 industry disclosure practices seems unduly harsh, it is important to remember not only that the Information Act embodies a philosophy of disclosure and that any exemptions should be narrowly drawn, but also that Congress has had six years to cure any perceived judicial deficiencies in the substantial competitive harm test and has declined to act.

Though the first National Parks decision (National Parks I) was generally not applauded by submitters, the second appeal to the District of

Columbia Circuit sub nomine National Parks and Conservation Association v. Kleppe⁴⁰⁶ (National Parks II) proved more satisfactory. The federal district court, for the second time, had determined that disclosure of most of the information was not required, though some financial data was deemed to fall outside of exemption four. The requester appealed to the circuit court, arguing that the lower court's finding that the submitters actually face competition and that disclosure would work substantial competitive harm were not supported by substantial evidence. The requester demanded detailed economic evidence to support the findings. However, the circuit court declined to turn an Information Act case into a mini-antitrust proceeding. Customer surveys showing the elasticity of the submitters' demand curves, detailed price and quality comparisons between submitters and their alleged competition, pricing and rate-of-return data, and marketing surveys were not deemed necessary to support the district court's findings that competition existed with other concessions and non-concessionary businesses, and that disclosure would be likely to cause substantial competitive harm.

Viewing the district court's findings that these five concessioners face competition in light of the extremely detailed and comprehensive nature of the financial records requested by the Association, we consider the likelihood of substantial harm to their competitive positions to be virtually axiomatic. Disclosure would provide competitors with valuable insights into the operational strengths and weaknesses of a concessioner, while the non-concessioners could continue in the customary manner of "playing their cards close to their chest." Selective pricing, market concentration, expansion plans and possible take-over bids would be facilitated by knowledge of the financial information the Association seeks. Suppliers, contractors, labor unions and creditors, too, could use such information to bargain for higher prices, wages or interest rates, while the concessioner's unregulated competitors would not be similarly exposed.⁴⁰⁷

This is a practical stance. A stricter interpretation of the test might have required sophisticated economic analysis. One appraisal suggested that under such an interpretation

It would be necessary to define the relative competitive positions of the companies in the industry. Assuming it could be shown that a competitor would be likely to make use of the submitter's information it would then be necessary to prove that the use which the competitor would make of the information would be likely to have an actual effect on the submitter's competitive position: that it would reduce the submitter's market share, sales, or increase the competitor's market share, profits, or sales in a manner that he would not otherwise have achieved. Such proof obviously would have been difficult and costly to present. Congress could not have contemplated that this type of analysis would be triggered each time an agency receives a request for business records under the FOIA.⁴⁰⁸

The decision in National Parks II concluded that sophisticated economic analysis was not required: "The court need only exercise its judgment in view of the nature of the material sought and the competitive circumstances in which the concessioners do business, relying at least in part on relevant and credible opinion testimony."⁴⁰⁹

There are two views as to the impact of National Parks II on the substantial competitive harm test. One view is that though the "substantial competitive harm" characterization has been retained, all that is needed to be shown is the existence of competition and that the business data is likely to be useful to competitors.⁴¹⁰ A second view is that the test remains unchanged, but the evidentiary standards have been relaxed in that relevant and credible opinion testimony may be used to prove competitive harm.⁴¹¹ In either case the burden of the submitter or nondisclosing agency has been eased.

In 1978 the Office of Federal Procurement Policy provided a "uniform policy and approach" on exemption four to agency heads.⁴¹² The policy letter reviews the National Parks I and II decisions, then requests that agencies provide submitters with notice of Information Act requests for acquisition data, and "give careful consideration to the facts that"

(a) (C)ommercial and financial information submitted in connection with a procurement frequently is submitted more or less voluntarily and public disclosure against the wishes of the submitter may result in less complete information in future procurements, and

(b) (T)he context in which such commercial and financial information is submitted--that of the highly competitive area of Government procurement and free market enterprise--makes it more likely that release of the information would in many instances cause competitive harm.⁴¹³

The policy letter also attempted to preserve an even-handed approach by noting the Act's philosophy of disclosure, the public interest in and right to scrutinize the government acquisition process with the assistance of the Information Act, and the need to examine each request for records on its own facts. However, the House Committee on Government Operations holds the OFPP policy letter in some disfavor, emphasizing that "the thrust of the letter is excessively weighed in favor of the withholding rather than the release of information."⁴¹⁴ The policy letter itself notes that "it is also in the public interest to protect certain types of material from disclosure."⁴¹⁵ Subordination of the business records exemption to the philosophy of disclosure no doubt contributes to the uneasiness submitters experience whenever their sensitive data is tendered to an agency.

In its Information Act guidance, the Department of Defense has provided examples of acquisition data which may qualify as exemption four data. Since the competitive environment is employed to define confidentiality, certain data may be exempt under exemption four while other data, of the same type, may be declared nonexempt. Furthermore, since "exemption" merely means exemption from mandatory disclosure, even exemption four data may be disclosed in the proper exercise of an agency's discretion. Nevertheless, the Defense Department has provided the following examples of potentially exempt data:

- a. Commercial or financial information received in confidence in connection with . . . bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions and discoveries, or other proprietary data.
- b. Statistical data and commercial or financial information concerning contract performance, income, profits, losses and expenditures, if offered or received in confidence from a contractor or potential contractor.

. . . .

- d. Personal statements given in the course of inspections, investigations, or audits, where such statements are received in confidence from the individual and retained in confidence because they cover trade secrets or commercial or financial information normally considered confidential or privileged or because they are essential to an effective inspection, investigation, or audit.
- e. Data provided in confidence by private employers in connection with locality wage surveys which are used to fix and adjust pay schedules applicable to prevailing rate employees within the Department of Defense.⁴¹⁶

The Defense Acquisition Regulation provides additional examples of documents which would normally be exempt:

(C)ost and pricing data submitted by contractors . . . ; documents or data appropriate for renegotiation purposes; price analyses based on contractor submitted data . . . ; documents supporting advance and progress payments; documents received from contractors relating to compliance with labor policies (e.g., records of compliance checks; payrolls or certified excerpts); settlement proposals, rejected engineering change proposals, invention reports or disclosures and value engineering proposals.⁴¹⁷

Other provisions of the Defense Acquisition Regulation suggest that the following documents and data may qualify under exemption four: solicited and unsolicited cost and technical proposals;⁴¹⁸ an offeror's cost breakdown, profit, overhead rates, manufacturing processes and techniques;⁴¹⁹ and contractor-volunteered information regarding wage rates and material costs used to prepare government estimates for proposed acquisitions.⁴²⁰ Technical and cost proposals submitted to agencies are of especial interest to competitors. Such documents are no doubt requested for a variety of reasons: to second-guess an agency contract award to the submitter; to ascertain a firm's technical capability and areas of primary expertise and emphasis; to obtain detailed descriptions of various techniques and methodologies, technical and management approaches, and test procedures; for information which relates to processes, operations, and style of work; and generally, for information which would allow a competitor to determine how a firm would approach a

particular problem based on employment of specific resources or approaches. Though cost and technical proposals provide a window into the submitter and are generally inimical to the submitter's competitive position, nondisclosure is not a foregone conclusion. In a climate of decentralized disclosure, with competitors assuming the role of requestors, with Congress and its staff convinced agencies are still withholding too much information, and with agencies uncertain of the competitive significance of data, agency protection of data considered sensitive by a submitter is not a constant.

Abuse of Agency Discretion

If a business submitter convinces an agency that its data is indeed a trade secret or confidential information, then the issue becomes whether the agency may nevertheless disclose the data pursuant to an Information Act request. To the dismay of corporate submitters, agencies may have discretion to disclose even business data which meets the stringent criteria of exemption four. The philosophy of mandatory protection of exempt data reached its zenith in a 1976 decision from the Fourth Circuit Court of Appeals, Westinghouse Electric Corporation v. Schlesinger:

The Act was intended . . . to "set up workable standards for what records should and should not be open to public inspection." . . . This provision in the Act was more than a simple exemption, it represented an express affirmation of a legislative policy favoring confidentiality of private information furnished to government agencies, the disclosure of which might be harmful to private interests.⁴²¹

The Fourth Circuit was not in tune with Congress which used the occasion of the 1974 Information Act amendments to declare that

Congress did not intend the exemption in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only permissive. They merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate--as well as that the intent of the exemption allows--that the information should be withheld.⁴²²

This view, which was shared by most courts, prevailed before the Supreme Court

in Chrysler Corporation v. Brown.⁴²³ In considering the same type of information that was before the court in Westinghouse Electric, equal opportunity data, the Supreme Court put the issue to rest. The present exemptions are permissive, not mandatory.⁴²⁴

Agencies may not, however, disclose with impunity. Where there is discretion to disclose, there is also the potential for abusing that discretion. The Supreme Court in Chrysler concluded its opinion with a discussion of the Administrative Procedure Act which provides for judicial review of adverse agency action.⁴²⁵ The Court drew upon an earlier decision, Citizens to Preserve Overton Park, Inc. v. Volpe,⁴²⁶ to support the conclusion that an agency's decision to disclose was reviewable agency action. In Overton Park the Secretary of Transportation had rubber-stamped approval of a six-lane highway through a public park in Memphis, Tennessee. However, statutes required that the Secretary disapprove highways through public parks unless there is no other "feasible and prudent alternative" to use of the park land, and unless any necessary park use attempts to "minimize harm" to the park.⁴²⁷ The district court and Sixth Circuit Court of Appeals had upheld the agency decision. A nearly unanimous⁴²⁸ Supreme Court reversed, taking the opportunity to essay at length on agency abuse of discretion. In its judicial review role, a court has several inquiries to make:

- (1) Did the Secretary act within the scope of his authority?
- (2) In determining whether the Secretary's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"⁴²⁹
 - (a) Was the Secretary's decision based on a consideration of the relevant factors, and
 - (b) Was the Secretary's decision a clear error of judgment?
- (3) Did the Secretary's action follow the necessary procedural requirements?⁴³⁰

In Chrysler the Supreme Court focused on whether the agency decision was "in accordance with law." Specifically, the Chrysler case was remanded to ascertain whether the Trade Secrets Act forbids disclosure of the equal

opportunity information at issue. If that statute forbids disclosure, then disclosure is contrary to law and an agency has no discretion to disclose exempt data. Chapter Three dealt at length with the impact of the Trade Secrets Act on exempt data.

Similarly, in GTE Sylvania, Inc. v. Consumer Product Safety Commission, the CPSC's seminal statute provided that before data identifying manufacturers is disclosed, the Commission shall take reasonable steps to insure the data is accurate, that disclosure is fair under the circumstances, and reasonably related to the purposes of the Act.⁴³¹ In spite of this mandate, the Commission obtained data from manufacturers on television-related accidents, specifying that all available data was sought, even though it might be "incomplete, unverified, and even inaccurate."⁴³² Verified reports were not distinguished from unverified reports. Mere speculation was sufficient to report a television related accident. Submitters of data interpreted what constituted a television related accident differently. Some manufacturers did not fully comply with the subpoena for information and were never compelled to do so. The Commission was even moved to draft a disclaimer to accompany the intended disclosure (which identified manufacturers): "The television accident statistics being released to you may be misleading because some television manufacturers were more conservative than others in maintaining television accident files."⁴³³ In spite of the Consumer Product Safety Act's demand for accuracy and fairness with a view toward fostering cooperation from industry and in spite of the existence of an alternative Commission report based on the same data which did not relate the dubious accident data to specific manufacturers, the Commission opted for disclosure. The district court enjoined disclosure. A reasonable probability of eventually prevailing on the merits was demonstrated by the Commission's abuse of discretion in the face of the Consumer Product Safety Act.

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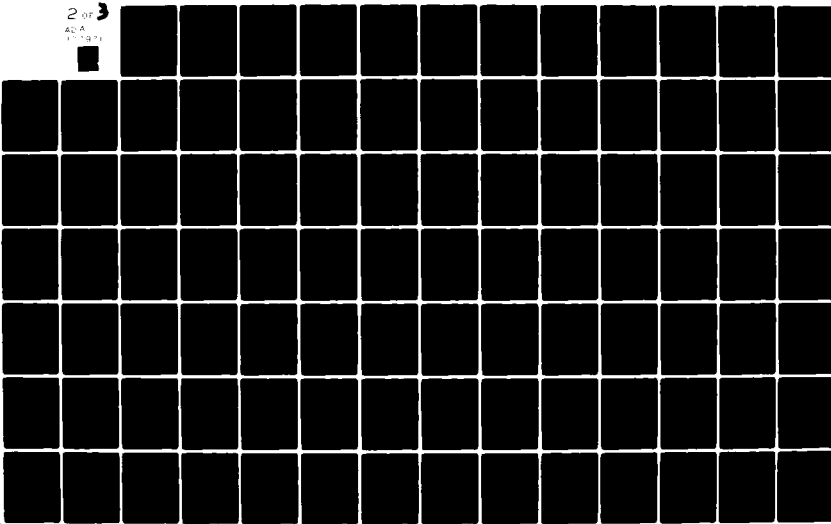
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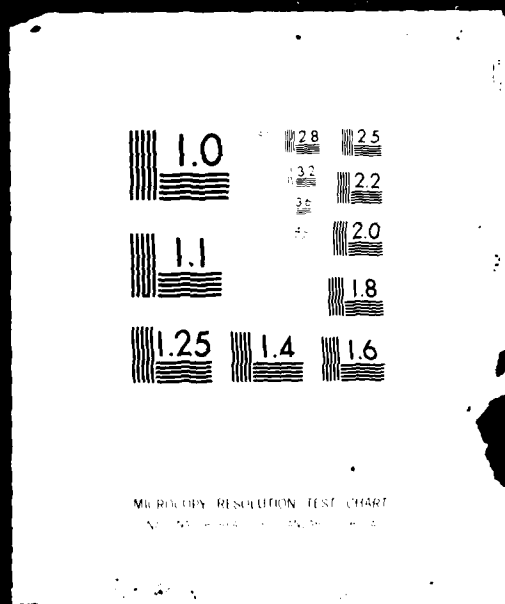
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While Chrysler and GTE Sylvania turn on whether a statute forbids disclosure or has been satisfied, an equally important consideration is whether all relevant factors were considered by the agency prior to exercise of discretion to disclose. Two illustrative cases in this area are Pennzoil Company v. Federal Power Commission⁴³⁴ and Charles River Park "A", Inc. v. Department of Housing and Urban Development.⁴³⁵ In Pennzoil natural gas producers were required to provide detailed natural gas reserve information which the FPC intended to disclose to the public. Producers objected to such disclosure, arguing exemptions four and nine, since such data is obtained only through expensive exploratory drilling and facilitates estimates of the potential productivity of nearby tracts.⁴³⁶ The FPC was unimpressed:

(W)e think the value to the public of this information far outweighs the claimed pecuniary interest of the producers in confidentiality. We recognize the disclosure of the reserve data requested by us may adversely affect the private interest of the producers, but such possible damage does not override in our view the public interest in disclosure.⁴³⁷

Just the year before this FPC decision to disclose, the Fifth Circuit Court of Appeals held that the FPC had abused its discretion in ordering disclosure of the identity of parties to various intrastate natural gas sales.⁴³⁸ No legitimate purpose was found to be served by such disclosure. In Pennzoil the Fifth Circuit similarly found an abuse of discretion in the FPC's failure to consider these three factors:

(1) Whether disclosure will aid the FPC in fulfilling its function. Assuming that the data in question will be of interest to consumers, are experts available to assist consumers, or will the data in fact only be used by other producers.

(2) Whether the public will be harmed from disclosure. The FPC should consider whether exclusive reserve data is a significant incentive to gas exploration; and whether exploration will be reduced if that incentive is destroyed through disclosure.

(3) Whether there are alternatives to detailed disclosure which may serve the consumer while protecting the producer. Perhaps information in the aggregate should be disclosed.⁴³⁹

In Charles River Park,⁴⁴⁰ decided the year prior to Pennzoil, a Boston tax assessor requested detailed financial reports submitted to HUD as the insurer of mortgages on multi-family housing projects. The requester's stated purpose was to use the data to set assessments on the housing projects for property tax purposes. The district court, in enjoining disclosure of the exemption four data, concluded inter alia that it would be an abuse of discretion for HUD to release the information.⁴⁴¹ The court concluded, five years before Chrysler, that if disclosure violated the Trade Secrets Act, it would be an abuse of discretion "to ignore such a statutory mandate."⁴⁴² The court also held that if the Trade Secrets Act does not apply

(T)he district court must balance the interests of the tax assessor and the public in accurate tax assessments against the interests of CRP in keeping the information confidential in determining whether HUD would abuse its discretion if it released the information. If it is necessary to strike this balance the district court should consider ways in which the interests of both parties may be accommodated. For example, it seems unlikely that all of the information filed with HUD would be of proper concern to Boston's tax assessor. Thus, it might be appropriate to release certain specified parts of the requested document to the assessor on the condition that he keep them confidential.⁴⁴³

In light of Overton Park and Pennzoil, and this language from Charles River, an agency failure to consider the interests of the requester and submitter in the disclosure of exempt material could be considered an abuse of discretion. Similarly, failure to consider the possibility of a partial release of exempt material accompanied by a promise of confidentiality could be an abuse of discretion.

Summarizing, while a court cannot substitute its judgment for that of an agency, agencies may not act in unrestrained fashion. With the background provided by the Overton Park, Chrysler, GTE Sylvania, Pennzoil, and Charles River Park decisions, it is possible to identify and examine relevant criteria for evaluating whether an agency's decision to disclose acquisition data is arbitrary and capricious, an abuse of discretion, or inconsistent with law. A

number of factors warrant consideration, including (1) substantive legislative constraints, (2) agency regulations, (3) interests in nondisclosure, (4) interests in disclosure, (5) promises of confidentiality, and (6) modified disclosure.

Legislative Constraints

Exemption three statutes, which were discussed in Chapter Three of this thesis, may inform an agency's discretion, or may completely remove discretion. However, even if a statute does not qualify under exemption three, that is, independent of the exemption three issue, an agency may abuse its discretion by ignoring statutory language. The Tax Reform Act of 1976 provides an example of an exemption three statute which removes agency discretion in the disclosure of specified categories of records. The Act provides for the deletion of sensitive documents before written determinations⁴⁴⁴ and background file documents⁴⁴⁵ are open to public inspection. Essentially, data categorized under exemptions one, three, four, five, eight and nine shall not be made available to the public.⁴⁴⁶ The mandate thus includes trade secrets and commercial or financial information.⁴⁴⁷ If IRS employees "intentionally or willfully" fail to delete the protected material the government is liable for actual damages of not less than one thousand dollars and for court costs and reasonable attorney's fees.⁴⁴⁸ Such statutory treatment would presumably drive the disclosure decision. Other statutes, independent of exemption three considerations, may advise or constrain the exercise of agency discretion. Examples include the Trade Secrets Act as analyzed above in Chrysler Corporation v. Brown⁴⁴⁹ and the Consumer Product Safety Act as analyzed in GTE Sylvania, Inc. v. CPSC.⁴⁵⁰ It would be an abuse of discretion as well as inconsistent

with law to disclose data in violation of such statutory constraints.

Agency Regulations

Some agencies have attempted to manage the deluge of Information Act requests by issuing categorical disclosure rules. It may be argued that an agency which fails to follow its own rules thereby abuses its discretion.⁴⁵¹ However, disclosure regulations are not always dispositive, and in certain situations, it may be an abuse of discretion to adhere to definitive disclosure rules.

Agency regulations were involved in the Chrysler case. The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) by regulation required government contractors to supply equal employment data which the OFCCP by regulation determined shall be disclosed.⁴⁵² Specifically, Standard Forms EEO-1, imposed EEO plans, final conciliation agreements, validation studies of tests, and dates of compliance reviews must be disclosed by regulation.⁴⁵³ Affirmative action plans are deemed releasable except to the extent they reveal major changes in contractor personnel requirements. Similarly, Food and Drug Administration regulations provide for both disclosure and nondisclosure of certain classes of data. One rule provides that the agency will not exercise its discretion to disclose business documents which are exempt.⁴⁵⁴ Technical proposals of successful offerors will be disclosed, but technical proposals of unsuccessful offerors are automatically exempt from disclosure.⁴⁵⁵ The FDA has also issued detailed guidance for specific categories of records. For example, manufacturing methods or processes and quantitative formulae from color additive petitions will not be disclosed. Production and sales data will not be disclosed unless aggregated.⁴⁵⁶

Is it a proper exercise of agency discretion to conclude that all exempt material or even certain exempt data will automatically be withheld regardless of the public interest in disclosure; or conversely, that all or even certain data will automatically be disclosed on request even if exempt, even if the requester has a private (not public) interest in the material, and even if a given submitter can demonstrate a likelihood of serious harm? Categorical rules may or may not reflect an abandonment of agency discretion, but in any case do not work well with acquisition records. The disclosure decision as to acquisition records is a function of variables which do not easily lend themselves to a static answer imposed by a categorical rule. The variable of "time" alone defeats static rules since the sensitivity of most acquisition records dissipates with time. The interests of requesters and submitters will also vary widely. Categorical rules enunciated prior to any given request of necessity apply to an agency conception of a standard "situation" with standard assumptions. Categorical rules ignore situations which do not fit the preconception.

In contrast with the OFCCP and FDA approaches, the Defense Acquisition Regulation merely provides examples of the kinds of business records which could qualify for exemption four. These examples were listed above.⁴⁵⁷ The DAR also provides general disclosure policy:

It is the policy of the Department of Defense to make available to the public the maximum amount of information concerning its operation and activities.

. . . .

A record exempt from public disclosure . . . should, nevertheless, be made available to the public when . . . no significant and legitimate governmental purpose would be served by withholding the record.⁴⁵⁸

This statement of disclosure policy is typical among federal agencies and is consistent with Department of Justice criteria for defending agencies in FOIA litigation. In 1977 Attorney General Bell, perhaps thinking of the 600-plus

Information Act cases on the dockets at that time, enunciated a test for providing Department of Justice litigation support to agencies.

In determining whether a suit against an agency under the Act challenging its denial of access to requested records merits defense, consideration shall be given to four criteria:

- (a) Whether the agency's denial seems to have a substantial legal basis,
- (b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,
- (c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and
- (d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.⁴⁵⁹

This policy commits the DOJ to defend agency nondisclosure only when disclosure would be "demonstrably harmful" and when it is "important to the public interest."⁴⁶⁰ The "demonstrably harmful" standard for litigation support is consistent with the "significant and legitimate governmental purpose" disclosure policy of the Defense Department and other agencies.

The broad disclosure policy and examples are clearly intended as guidance to assist agency officials in the exercise of discretion. The definitive disclosure rules generally purport to be more than mere guidance. Such rules are intended to be dispositive for the types of data described. What deference will such rules be accorded outside the agency? Some disclosure regulations have the "force and effect of law." Others are mere interpretive rules which are accorded varying degrees of deference "based on such factors as the timing and consistency of the agency's position, and the nature of its expertise."⁴⁶¹ The latter type of rules may be accorded no more deference than the Defense Department's general guidance and examples. In contrast, regulations with the force and effect of law must be (1) substantive rules (rules which affect individual rights and obligations); (2) promulgated according to the APA's rule-making procedures (involving notice and a meaningful opportunity to comment); and (3) issued pursuant to legislative

authority.⁴⁶² The Supreme Court determined in Chrysler v. Brown that regulations providing for the disclosure of equal opportunity data would not be accorded the force and effect of law for want of the latter two elements of the test.⁴⁶³ The procedural deficiencies should be curable, such that legislative authorization becomes the constraint. An example of legislative authorization is found in the Social Security Act. One provision authorizes the Secretary of Health, Education and Welfare to promulgate regulations providing for the disclosure of data submitted under the Medicare program.⁴⁶⁴ Regulations providing for the disclosure of Medicare cost reports were recently accorded the force and effect of law by the Fifth Circuit Court of Appeals.⁴⁶⁵

Once a regulation with the force and effect of law is found, to ignore the disclosure or nondisclosure mandate would probably violate the APA, which provides for setting aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴⁶⁶ Thus, for agencies which wish to promulgate substantive disclosure rules, the first difficulty is to identify (or to solicit from Congress) legislative authority. Without such authority, even specific rules which call for disclosure or non-disclosure become mere guidance which may or may not be accorded deference in court. Specific disclosure rules which are merely interpretive or administrative will be treated the same as general "guidance" and "examples" and disclosure "policy" published by agencies. Before examining the status of interpretive disclosure rules, one caveat should be noted concerning disclosure regulations with the force and effect of law. This latter status is not completely sacrosanct. Disclosure regulations must not only be reasonably within the contemplation of the grant of statutory authority,⁴⁶⁷ but also must not themselves be arbitrary and capricious or represent an abuse of discretion.⁴⁶⁸ Even a substantive regulation will probably be ignored in

certain circumstances. For example, if data is nonexempt yet an agency regulation commands nondisclosure, the regulation should be ignored unless its authorizing statute manifested an intention that the Information Act be subordinated to it.

Interpretive regulations may provide for the disclosure or nondisclosure of exempt data. The Information Act is silent as to exempt data. The Act commands disclosure of nonexempt material; exempt material falls outside its ambit.⁴⁶⁹ However, the APA is still operative. It may be an abuse of discretion for an agency to blindly adhere to a rule providing for automatic disclosure of a class of records under certain fact situations. For example, the competitive harm stemming from disclosure may be severe and the interest in disclosure whimsical, or calculated to insure that the submitter does indeed suffer the competitive harm, with no apparent public interest in disclosure. Adhering to an interpretive disclosure rule under such circumstances is agency action ripe for review under the APA's arbitrary, capricious, and abuse of discretion standard. Disclosure may affect submitters differently. This is a basic truth recognized by the competitive harm test, which argues against any automatic rule, and for a case-by-case approach. Disclosure of the same type of data may have negligible effect on some firms, and a devastating impact on others. Hoisting an agency rule overhead and using that rule to excuse the agency from weighing the factors cited in this section could support a charge of arbitrariness. For example, adherence to an interpretive rule commanding nondisclosure of a class of exempt records in the face of a significant public interest in disclosure such as safety or health or the public welfare or to prevent fraud and wrongdoing may be deemed arbitrary. The agency which refuses to weigh relevant factors and relies instead on a static rule may be charged with an abuse of discretion. Under this analysis, interpretive rules which purport to make specific disclosure determinations should be viewed as

"examples" to guide the discretion of agencies, and not as edicts to be adhered to in all instances. Perhaps the real value of categorical rules is to place submitters on notice that for the designated records the government may not provide protection. Categorical rules may also prove useful in subsequent litigation if an agency violates them without any apparent reason, disclosing for example when a rule provides for withholding and withholding when a rule provides for disclosure. Such action will probably be inconsistent with prior practice and may be labeled arbitrary and capricious unless the agency can conjure a public interest rationale to explain and justify such aberrant behavior. The following framework of analysis summarizes some of the considerations surrounding exempt data and agency regulations.

<u>If Interpretive Agency Regulations Provide For</u>	<u>And the Agency</u>	<u>Then the Agency May Have</u>
I. Nondisclosure	A. Withholds	Abused its discretion if there is a public interest warranting disclosure (safety, health, exposure of fraud).
	B. Discloses	Abused its discretion <u>unless</u> there is a public interest rationale justifying disclosure (safety, health, exposure of fraud).
II. Disclosure	A. Discloses	Abused its discretion if there is a strong submitter interest warranting nondisclosure (competitive harm) and no counterbalancing public interest in disclosure.
	B. Withholds	Abused its discretion <u>unless</u> the submitter's interest in nondisclosure (competitive harm) warrants withholding.

Interests in Nondisclosure

Consider the interests Congress attempted to preserve through the fourth exemption. The stringent tests required to achieve exemption four status and vindication of the interests manifested in exemption four are important factors to be weighed. Basically, an agency ought to have a very good reason for disclosing trade secrets,⁴⁷⁰ records which will impair the government's ability to secure data in the future, and material which will likely visit substantial competitive harm on a submitter. To reveal a trade secret which was developed at great expense and thereby dissipate its value (and the incentive for developing trade secrets) requires considerable public interest rationale. To reveal private commercial or financial data which would likely enable a competitor to derive component costs, ascertain what new products and processes were being developed, evaluate production capabilities and technology employed, identify customers and their needs, conduct employee raids, reduce risk-taking in purchasing capital equipment, and develop competitive bid strategies⁴⁷¹ would similarly require a notable public interest. It is in the public interest to encourage submission of unexpurgated unsolicited proposals and a full portrayal of innovative ability in solicited technical proposals. It is in the public interest to increase the number of contractors in the government acquisition process and to acquire the most advanced technology for the tax dollar.⁴⁷² It is generally not in the public interest to force contractors to calculate how much sensitive information the government can be trusted with. The agency which refuses to consider interests in nondisclosure may well be abusing its discretion.

Interests in Disclosure

Considerable discussion has centered on the issue of whether or not a request for purpose or motivation in demanding documents is of legitimate

interest to the agency.⁴⁷³ The Information Act clearly states that records shall be made promptly available "to any person."⁴⁷⁴ The House Committee on Government Operations reiterates the point: "No FOIA requester should be obliged to explain the reasons for the request. A decision to withhold information should be based on the nature of the information and the need for confidentiality rather than the identity of the requester."⁴⁷⁵ However, as the Third Circuit Court of Appeals in Wine Hobby USA, Inc. v. Internal Revenue Service pointed out, it is only nonexempt material that must be made available "to any person."⁴⁷⁶ In Wine Hobby the requester desired the names and addresses of persons who had registered with the government in order to produce wine for family use. The requester, a commercial firm, desired to send promotional literature to these individuals. The government argued that disclosure would involve an unwarranted invasion of privacy and withheld the data under exemption six. The court balanced the invasion of privacy which would result from disclosure against what it perceived as the absence of any identifiable public interest and permitted withholding. The requester's motivation, commercial solicitation, was not deemed to be a purpose underlying the Information Act.⁴⁷⁷ If the requester had been able to identify a "public interest" purpose, it presumably would have been balanced.

A similar balancing should occur for data withheld from mandatory disclosure under exemption four. For example, the requester in Charles River Park "A", Inc. v. Department of Housing and Urban Development provided a "public interest" motivation for its data request: to assess property for purposes of taxation.⁴⁷⁸ The District of Columbia Circuit Court of Appeals remanded the case with instructions. If the requested data was found to fall within exemption four, the district court must then balance the interests of the requester and the public in accurate tax assessments against the interests of the submitter in confidentiality.⁴⁷⁹

There are other legitimate public interests which could be identified with or without the assistance of requesters. For example, disclosure of some business data may be necessary to foster a more open acquisition process with a consequent reduction in fraud, waste, and abuse. Data on EEO compliance by government contractors may foster fair employment practices. Data could have environmental, safety, and health implications. Of course, a requester may remain mute or make a blind request through an agent, in which case an agency or court is left to its own devices in conjuring any public interest in disclosure. Or the requester may assist in the delineation of the public interest in disclosure of exempt material. If neither the requester nor the agency is able to conjure a public interest to be balanced against the submitter's interest in confidentiality, then a request for exempt material may suffer denial as in Wine Hobby.

Promise of Confidentiality

It is now clear that as to exempt status, a mere agency promise of confidentiality to the submitter is not dispositive.⁴⁸⁰ However, when the issue is whether or not exempt data should be disclosed, agency promises to withhold data are of more than passing interest. An unexplained reversal of a former promise takes on the trappings of arbitrariness. In fact, there is a governmental interest in giving life to former promises. Citizens should be able to rely on an agency promise, absent a compelling reason to disclose exempt material. Similarly, though stare decisis is an unrecognized doctrine outside the courtroom, an unexplained departure from prior agency determinations to withhold data or disclose data is an indication that an agency may be acting arbitrarily and capriciously. The agency may be ignorant of the precedent or of the relationship of the data in question to the settled treatment. In any case, a breach of promise or an inconsistent decision,

absent a viable rationale, raises the abuse of discretion issue.

Modified Disclosure

The 1974 Amendments to the Information Act provided for the release of reasonably segregable, nonexempt portions of otherwise exempt records.⁴⁸¹ A corollary principle should prove useful to an agency balancing interests. If the public interest could be furthered and the submitter's interest protected by the release of summarized data or by a partial release, such modified disclosure could constitute a proper exercise of agency discretion.⁴⁸² Additionally, a release conditioned on a requester's promise of confidentiality may prove useful in certain fact situations.⁴⁸³ Where the submitter has made the case for nondisclosure of exempt data, yet a certain public interest could be served by disclosure, then a limited release may be a proper exercise of agency discretion. Conversely, failure to consider such practical remedies may constitute an abuse of agency discretion.

An agency which refuses to consider legislative constraints, agency regulations, interests in disclosure and nondisclosure, promises of confidentiality and a settled treatment of certain records, and the possibilities of modified or conditional disclosure may well be abusing its discretion in violation of the Administrative Procedure Act.⁴⁸⁴

Remedies

If data is improperly withheld, the principal judicial remedy is to enjoin the withholding. Additionally, the 1974 Amendments to the Information Act provide that a court may assess attorney's fees and other court costs against the government where the requester has "substantially prevailed";⁴⁸⁵ that "arbitrary or capricious" withholding of records may result in disciplinary action against the principal perpetrator;⁴⁸⁶ and that noncompliance with a court's disclosure order may be punished by contempt.⁴⁸⁷

Award of attorney's fees and court costs has occurred on occasion.⁴⁸⁸ Disciplinary action and contempt citations have generally not been employed since only the most flagrant conduct will support such action. For disciplinary action a court must order disclosure of records "improperly withheld"; attorney's fees and court costs must be assessed against the government; the court must make a written finding that the issue of arbitrary or capricious agency conduct has been raised; and the Special Counsel of the Merit System Protection Board must investigate and provide the agency findings and recommendations. Only then will the agency in question act.⁴⁸⁹ Since these and other provisions of the Information Act do not apply to exempt material,⁴⁹⁰ the "arbitrary or capricious" withholding apparently pertains only to nonexempt material. However, since exempt status is often a complex legal issue, disciplinary action would normally not be available unless an agency official retains material nonexempt beyond any doubt or material a court has declared to be nonexempt. At this latter point a contempt citation may also be called for. The language of adverse action is a clear expression of disclosure policy, as is the language of fine and imprisonment in the Trade Secrets Act. Neither may actually be used,⁴⁹¹ but each should nevertheless minimize the more flagrant abuses by government officials. The requester's true remedies remain disclosure itself and perhaps an award of attorney's fees and court costs.

It should be noted that the Information Act does not provide for disciplinary action against officials who arbitrarily and capriciously disclose exempt material. If data is improperly disclosed, what remedies, if any, does the submitter enjoy? An improper and unexecuted agency decision to disclose may be enjoined under the Administrative Procedure Act.⁴⁹² But what if the agency rushed to disclosure, and abused its discretion in the process under the criteria outlined in the preceding section? The Trade Secrets Act,

if applicable to the improperly disclosed data, provides for a criminal penalty of not more than one year in prison or a one thousand dollar fine, or both plus removal from office.⁴⁹³ The Tax Reform Act of 1976 provides for actual damages of not less than one thousand dollars and award of court costs and attorney's fees for an intentional disclosure of certain data.⁴⁹⁴ This is a more realistic remedy. Outside of specific statutes with a specific focus, does the submitter possess any remedy to redress the improper disclosure of valuable data? The first principle is that a court will be able to enjoin disclosure only if the issue has not been mooted by release, and only if there is a statutory basis for injunctive action such as the Administrative Procedure Act, Trade Secrets Act, or Tax Reform Act of 1976. Absent statutory authorization to enjoin disclosure, the submitter's remedy, if any, would be money damages. The aggrieved submitter must survey tort law, contract law, and the Constitution for a theory of recovery.

A private party who tortiously misuses or discloses without right a trade secret may be liable for damages.⁴⁹⁵ However, when the disclosing party is the government, the first requirement is consent to be sued. Nearly three decades ago, in Aktiebolaget Bofors v. United States,⁴⁹⁶ the District of Columbia Circuit Court of Appeals held that the Federal Tort Claims Act⁴⁹⁷ does not permit suit for breach of confidential disclosure. Absent the overruling of Bofors or amendment of the FTCA, tort law does not appear to provide a viable remedy to redress the government disclosure of trade secrets.

The Tucker Act⁴⁹⁸ provides the Court of Claims with jurisdiction to render judgment on claims founded in express or implied-in-fact contracts. The Contract Disputes Act of 1978⁴⁹⁹ provides boards of contract appeals with the same jurisdiction as the Court of Claims. Two scenarios will test the efficacy of contract law in providing a remedy for improper agency disclosure.

The first scenario concerns an express contract, the second a contract implied-in-fact.

Scenario No. 1. A defense contract provides for a final technical report to be a deliverable item. The report arrives with several pages marked proprietary. The contractor's position is that the markings are proper since the data is associated with items, components or processes developed wholly at the contractor's own expense and does not constitute the type of data which must be delivered with unlimited rights regardless of its origin. The government concurs with the origin of data and uses the report internally. An Information Act request is received for the technical report. The government considers the data with markings to constitute exemption four material, but exercises its discretion to fill the Information Act request. The contractor is able to quantify its injury.

DAR 7-104.9(a)⁵⁰⁰ provides that data associated with items developed at the contractor's own expense may be delivered to the government with limited rights. Limited rights do not include the right to generally disclose and use the data outside the government. If the data is in fact proprietary to the contractor, and the government discloses it, a remedy should lie under the contract.

Scenario No. 2. There is no contract in existence. The government has received an unsolicited proposal stamped with restrictive markings;⁵⁰¹ or the government has issued a Request for Proposals and in response has received several cost and technical proposals with restrictive markings. The government considers the data in question to be exempt from mandatory disclosure under exemption four. An Information Act request for a technical, management, and cost proposal is received. The government exercises its discretion to fill the request.

In this scenario there is no express contract. The classic implied-in-fact contract case was Padbloc Company v. United States.⁵⁰² The Court of Claims found that the Padbloc Company had submitted technical data to the government pursuant to an "understanding" not yet reduced to contract. The government violated the understanding by disclosing Padbloc's technical data to industry. The Court of Claims found a breach of an implied-in-fact contract. The case was remanded for damages to be determined, and the parties agreed to a \$245,000 settlement in favor of Padbloc.⁵⁰³ After surveying Padbloc and related cases, a 1967 monograph outlined the requisite elements for recovery

under both express and implied-in-fact contract theories. The outline still provides the gauntlet a submitter must face to recover for such data disclosure:

(1) Authority. It is a basic rule of Government contract law that for a contract, be it express or implied in fact, to be binding upon the Government, the agent who acts for the Government must be authorized; or if not authorized, his acts must be ratified by one with the requisite authority. Therefore, for a contract implied in fact to result from a disclosure of a trade secret, the agent to whom it is disclosed must have authority to contractually bind the Government.

(2) Communication.

(a) The owner must communicate to the authorized agent that he is offering the Government a trade secret. The communication may be by a restrictive legend placed on the information containing the secret or by separate letter that clearly identifies such information and restricts its use.

(b) The Government must accept this restrictive offer. Acceptance may either be express, i.e., in writing; or implied, i.e., by retention and use.

(3) Consideration. The Government must have promised to compensate the owner for his disclosure. An express promise, however, need not be proven. It is sufficient to establish that the acts of the Government's agents induced the owner to disclose his secret, and that it was reasonable for him to expect, in reliance upon those acts, that he would be compensated for his disclosure.

(4) Damage. The owner must have been injured as a result of the Government's improper use or disclosure of his trade secret. Thus, if the owner publicly discloses the information containing the secret, thereby destroying its secrecy, the mere fact that the Government uses or discloses that information will not entitle him to recover therefor.⁵⁰⁴

There is arguably a bargain of sorts or an understanding at some level between government and contractor when a proposal, whether unsolicited or solicited, is tendered. The government is able to review fresh technical approaches and may accept the offer which best satisfies government requirements. The contractor, on the other hand, may secure government funding, and has a reasonable expectation that tendered proposals will be honestly considered and will receive protection commensurate with the language of various restricted legends.⁵⁰⁵ It may be argued that the Information Act subordinates mere agency regulations, that the Defense Acquisition Regulation itself makes

explicit the subordination,⁵⁰⁶ and in any case, since Petkas v. Staats⁵⁰⁷ it has been clear that promises of confidentiality may not be given effect. However, restricted legends are subordinated to the Information Act only when data is nonexempt. For exempt data the Information Act falls away, leaving the explicit promise that data will not be used or disclosed outside the government.⁵⁰⁸ The principal contracting officer has the authority to bind the government. The restricted legend provided in the Defense Acquisition Regulation advises that the data is to be kept confidential. The contracting officer normally accepts the proposals with this restriction. The proposal data is clearly sensitive and valuable. The contractor has been induced to rely on the promises of the DAR. Injury from disclosure should be quantifiable. In sum, disclosure of exempt business data pursuant to FOIA request could, arguably, be redressed under an implied-in-fact contract theory. It may be that the Padbloc precedent has not yet been employed in a court challenge since valuable trade secrets are routinely protected by agencies in practice.

A final possible theory is that disclosure of trade secrets constitutes a Fifth Amendment taking of private property. Little case law is available on point. However, the Third Circuit Court of Appeals rejected the constitutionality argument in a case involving rulemaking on disclosure practices:

A voluntary submission of information by an applicant seeking the economic advantages of a license can hardly be called a taking. And a voluntary submission of information by a private enterprise in a rule-making proceeding is not likely in the absence of hope of similar economic advantage.⁵⁰⁹

Similarly, the government has argued in FOIA litigation that any proprietary interest in data "... is waived by any contractor doing business with the government."⁵¹⁰ Nevertheless, there is some indication of life in the doctrine. In Wearly v. Federal Trade Commission,⁵¹¹ a district court ruled

that certain confidential business records subpoenaed by the agency need not be provided unless guaranteed protection from disclosure. The court's rationale was that disclosure is a taking of property without compensation prohibited by the Fifth Amendment. Furthermore, the Justice Department has testified in congressional hearings that disclosure of trade secrets might constitute an unconstitutional taking.⁵¹² The Fifth Amendment taking argument should be argued as an alternative theory of recovery to the express or implied-in-fact contract theories.

Data eligible for exemption four is generated by private submitters. Business submitters may well wonder how much of the responsibility to protect truly sensitive material agencies will shoulder.⁵¹³ The Administrative Procedure Act provides a floor of protection against an agency which exhibits little or no knowledge of the value of the data, nor any interest in exploring the implications of disclosure.

The prudent agency which decides to disclose over a submitter's objection will create a record with a two-tiered analysis. First, the agency will attempt to demonstrate that the requested material is not exempt and must, therefore, be disclosed. Second, the agency will show that, even if the material in question is ultimately deemed to be exempt, that a proper exercise of discretion likewise leads to disclosure. The agency which typically stops its analysis after deciding that the requested material does not meet one of the stringent tests for exemption four may later find, in court, that it guessed wrong on the exempt status issue, and that the entire matter must be remanded for further agency proceedings since the agency, in failing to consider any relevant factors, has failed to exercise any discretion at all.⁵¹⁴

CHAPTER FIVE

INTERNAL MEMORANDA

Exemption five protects from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."⁵¹⁵ The exemption has traditionally encompassed attorney-client and attorney work products, as well as internal agency deliberative material. Exemption five has also been sought as a refuge from disclosure for non-deliberative material, including the government's commercial information and government generated or sponsored material which would be eligible for exemption four protection if it belonged to private firms. These latter three categories of information will be discussed in this chapter; attorney-client confidences and attorney work products are beyond the scope of this thesis.

The statutory language of exemption five purports to exempt that "which would not be available by law," or material which is not discoverable. The problem with this characterization is that discoverable material is not an absolute. The purpose of the party seeking discovery is not wholly irrelevant in a discovery motion as is the motivation of the requester seeking disclosure through a FOIA request. As the District of Columbia Circuit Court of Appeals has observed, "A court's decision in a discovery case may rest in part on an assessment of the particularized need of the party seeking discovery, but in a FOIA suit, the court does not consider the needs of the requester."⁵¹⁶

This dilemma was recognized by the Supreme Court in EPA v. Mink and again in FOMC v. Merrill:

We are mindful that "the discovery rules can only be applied under Exemption 5 by way of rough analogies . . . and, in particular, that the individual FOIA applicant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5."⁵¹⁷

Deliberative Material

EPA v. Mink was the Supreme Court's first consideration of exemption five. The case rose from the underground nuclear tests known as "Cannikin" scheduled to take place at Amchitka Island, Alaska in the fall of 1971. There were rumors that the recommendations as to the advisability of the test were not unanimously favorable. Congresswoman Mink demanded release of the recommendations and when release was not forthcoming, filed an Information Act suit. The documents at issue included memoranda, letters, and reports classified "Secret" and "Top Secret." Exemption five was called upon to protect several unclassified memoranda and letters.⁵¹⁸ The documents had been sent to the chairman of a committee of the National Security Council formed to provide advice to the President on the underground nuclear test program. The Supreme Court essayed at length on the parameters of exemption five, turning first to the classic executive privilege case, Kaiser Aluminum, then to the legislative history of exemption five. The Court of Claims opinion in Kaiser Aluminum & Chemical Corporation v. United States was recalled for the fundamental basis of exemption five: "There is a public policy involved in the claim of privilege for this advisory opinion . . . the policy of open, frank discussion between subordinate and chief concerning administrative action."⁵¹⁹ The Supreme Court also drew upon the legislative history of exemption five for the same rationale:

It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl."⁵²⁰

Since it is the "consultative" or "deliberative" function of government which is subject to injury, severable factual material would generally be discoverable, absent another applicable exemption. The Supreme Court in Mink remanded so that the district court, through submission of detailed affidavits, oral testimony, or in camera inspection, could identify and disclose factual material which was not inextricably intertwined with the deliberative process.

Pre-decisional Material

Two years after EPA v. Mink, the Supreme Court handed down two exemption five decisions on the same day, NLRB v. Sears, Roebuck & Co.⁵²¹ and Renegotiation Board v. Grumman Aircraft Engineering Corporation.⁵²² In these two cases the policy behind exemption five was reviewed, with the focus on the "pre-decisional/post-decisional" element.

Sears, Roebuck & Co. had requested certain memoranda which were generated by the NLRB's Office of General Counsel pursuant to the issue of whether to permit the filing of unfair labor practice complaints. The lower courts agreed with Sears that the memoranda in question were adopted by the NLRB and were thus disclosable final opinions,⁵²³ while the government argued for withholding based on exemptions two, five, and seven. The Supreme Court examined at length the nature of the memoranda and concluded that those documents ". . . which explain decisions by the General Counsel not to file a complaint are 'final opinions' made in the adjudication of a case and fall outside the scope of Exemption 5; but that those . . . (m)emoranda which explain decisions by the General Counsel to file a complaint and commence litigation before the Board are not 'final opinions' made in the adjudication of a case and do not fall within the scope of Exemption 5."⁵²⁴

The rationale for this distinction has significance beyond the agency adjudication arena. The Supreme Court observed that post-decisional documents

may be disclosed without affecting the decision-making process, while prior communications and "ingredients of the decision-making process"⁵²⁵ must be protected to preserve the climate for candid opinions, recommendations, and deliberations. Exemption five calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be."⁵²⁶ Though this characterization of the rule sounds plausible, there is difficulty in its implementation. An agency's "effective law and policy" may be found even in documents which launch further activity. A good example is the very memoranda in Sears which directs the filing of a complaint. The Court in Scars was obviously troubled by this dual status of the memoranda when it recognized

(T)hat an Advice or Appeals Memorandum directing the filing of a complaint--although representing only a decision that a legal issue is sufficiently in doubt to warrant determination by another body--has many of the characteristics of the documents described in 5 USC § 552(a)(2) Although not a "final opinion" in the "adjudication" of a "case" because it does not effect a "final disposition," the memorandum does explain a decision already reached by the General Counsel which has real operative effect--it permits litigation before the Board; and we have indicated a reluctance to construe Exemption 5 to protect such documents. . . . We do so in this case only because the decisionmaker--the General Counsel--must become a litigating party to the case with respect to which he has made his decision. The attorney's work-product policies which Congress clearly incorporated into Exemption 5 thus come into play and lead us to hold that the Advice and Appeals Memoranda directing the filing of a complaint are exempt whether or not they are, as the District Court held, "instructions to staff that affect a member of the public."⁵²⁷

Apparently the attorney work-product rule rescued from disclosure memoranda which served to explain the decision to file a complaint. Professor Davis has criticized the result in Sears as allowing a degree of "secret law."⁵²⁸ Statements of policy and interpretations, which are supposed to be disclosed,⁵²⁹ may nevertheless be withheld if the action to which the documents are associated is not "final." Professor Davis argues that

When a memorandum of the General Counsel explains a decision to file a complaint, and when a portion of the memorandum is a reasonable opinion on the question of whether or not to assert jurisdiction, that portion of the memorandum may be the only agency law on the subject. For that reason, that portion of the memorandum should be available for public inspection. Yet the Court held in the Sears case that it need not be. To that extent, the holding seems to be an authorization of secret law, despite the Court's language to the contrary.⁵³⁰

Much clearer is the Supreme Court's conclusion that documents incorporated by reference into disclosable memoranda become themselves disclosable. If an agency expressly adopts a pre-decisional memorandum as the final opinion, it becomes by this act a disclosable document.⁵³¹

The companion case to Sears was Renegotiation Board v. Grumman Aircraft Engineering Corporation.⁵³² Just as a full understanding of the NLRB practice drove the decision in Sears, the renegotiation process was dispositive in Grumman. As in Sears, the issue was the pre- versus post-decisional nature of agency-generated documents. Grumman had requested records of renegotiation proceedings involving fourteen other companies.⁵³³ The district court refused to order disclosure, but the District of Columbia Circuit Court of Appeals reversed and remanded for the district court to release "final opinions including concurring and dissenting opinions"⁵³⁴ under the Information Act. This is the same issue that arose in Sears. Should the documents in question be treated as merely advisory to the Renegotiation Board which had the final decisional authority (and withheld), or should the documents be treated as statements of policy and interpretations of Regional Boards and "divisions" of the Renegotiation Board (and released)? The district court argued persuasively that

As to the Regional Board Reports in clearance cases, the court characterizes the clearance as the "decision" of the Regional Board "unless the Board is not in accord"; and held that "(i)n order for the public to be fully informed, the reasons behind the clearance . . . must be made available and in this type of case such . . . reasons are found in the Regional Board's report." As to the Division Reports, the court said that, although the Board may disagree with the reasoning of the report, "(i)t is

in fact the last document which explains reasons for the Board's decision," it should at the very least . . . reflect the analysis of one member," and thus it must be disclosed at least as a "concurring (or) dissenting opinion."⁵³⁵

The District of Columbia Circuit Court of Appeals affirmed, adding that even if the Regional Board Reports were not final opinions and were merely advisory to the Renegotiation Board, they were nevertheless "final opinions" of the Regional Board and thus disclosable under 5 U.S.C. § 552(a)(2)(A).⁵³⁶ Furthermore, the Regional Board Reports were "not solely part of the consultative and deliberative process, but rather reflect actual decisions communicated outside the agency."⁵³⁷ The Supreme Court was unpersuaded and reversed the lower courts.

(B)oth Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not. Because only the full (Renegotiation) Board has the power by law to make the decision whether excessive profits exist; because both types of reports involved in this case are prepared prior to that decision and are used by the Board in its deliberations; and because the evidence utterly fails to support the conclusion that the reasoning in the reports is adopted by the Board as its reasoning, even when it agrees with the conclusion of a report, we conclude that the reports are not final opinions and do not fall within Exemption 5.⁵³⁸

The Supreme Court in Sears had observed that a memorandum directing the filing of a complaint was not a "final opinion" since it did not effect a final disposition, but that such memoranda do explain the decisions of the NLRB General Counsel to permit litigation before the NLRB.⁵³⁹ As a result, it was with some reluctance that the Court permitted nondisclosure, and perhaps only on the basis that the memoranda additionally constituted an attorney's work product. In contrast, the Supreme Court in Grumman manifested no such reluctance in withholding from disclosure renegotiation memoranda. The NLRB memoranda in Sears may arguably have been characterized as "statements of policy and interpretations" which are to be available for public inspection.⁵⁴⁰ The renegotiation memoranda in Grumman were perceived by the Supreme Court as

created exclusively for the purpose of discussion. They were purely deliberative tools protected from disclosure by exemption five.⁵⁴¹

The sum of Mink, Sears, and Grumman is that nonfactual, predecisional, unincorporated deliberative material is protectable under exemption five. The protection is designed, as one commentator noted, to "enhance the efficiency of government agencies in carrying out executive branch programs and activities, by encouraging better decision-making and policy making within and among federal agencies, in two mutually complementary ways:"

(a) (3)y assuring presidents, agency heads and other decision-makers that they can safely welcome a full spectrum of candid expressions from their staffs and/or peers, because they will be free to accept or reject all such input on its apparent intrinsic merit, not whether a particular staff memorandum may make the official's action look better or worse, especially if the action is controversial or later proves unsuccessful; and

(b) (B)y giving the authors of such papers greater security for describing their ideas freely, with their honest analysis and best judgment on the issues, frank comments on the factors to be considered pro and con, and unfettered appraisal of the relative merits of alternative options--all without worrying whether, at an early or later date, the disclosure of their expressions, perhaps selectively or in a different climate of popular attitudes, may stir political, social or financial reactions or pressures against themselves or their bosses.⁵⁴²

Acquisition Records

The Mink case dealt with a politically explosive issue, underground nuclear testing, while Sears and Grumman dealt with the NLRB and the Renegotiation Board. These latter two cases were concerned with "litigation" processes within agencies. None of these cases dealt with memoranda associated with the management decisions involved in the acquisition process. Thus, a threshold issue is whether exemption five guidance forged in political debate and "litigation" scenarios is operable in "management decision" scenarios. The answer is that predecisional, deliberative material in the acquisition process is protectable under the analyses of Mink, Sears, and Grumman.

Potentially deliberative materials in the acquisition process have been identified by the Defense Acquisition Regulation as "(t)hose nonfactual portions of evaluations . . . of contractors and their products" by government employees.⁵⁴³ The DAR also provides the following examples of documents which may contain protectable deliberative matter: "cost and price analysis . . .; negotiation memoranda; procurement management reviews, such as Contract Performance Evaluation Reports; Government price estimates; pre-award surveys and other advisory documents considered by contracting officers in determining contractor responsibility for award purposes and other documents containing staff advice preliminary to an award of a contract; records of Source Selection Boards, Contract Review Boards, etc.; advisory documents regarding termination actions; advisory records concerned with contract administration, such as production surveillance, quality assurance and inspection reports; and renegotiation reports . . .".⁵⁴⁴ In addition to deliberative material any of the cited documents may also contain disclosable factual material.

Exemption five case law has also embraced acquisition material. For example, deliberative material was requested in Audio Technical Services, Ltd. v. Army.⁵⁴⁵ Audio had responded to an Army Request for Proposals with the lowest cost proposal. Audio protested the Army determination to award to another firm and subsequently requested, inter alia, the evaluation which recommended award to the competitor. The Army, and the district court, declined to release the "basic ingredients" of the evaluation and the recommendations of the evaluation team. The court noted that

Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process. The Army asserts that . . . such considerations are paramount in order to encourage frank discussion among personnel of the evaluation and selection teams and that such a course is in the best interests of the Government . . . If Government employees expected every written recommendation, cost analysis, or feasibility opinion . . . would be the object of intense scrutiny by the party adversely affected . . . they would be likely to communicate

orally and or conclusionally. The cost of such an eventuality in terms of efficiency and quality of decisionmaking could be great indeed.⁵⁴⁶

Thus, the court found that nonfactual, predecisional material may exist in the source selection process and be protected from disclosure with a rationale drawn from Mink, Sears, and Grumman. However, there is a price levied for the preservation of the security of the evaluative process. Audio Technical Services, Ltd. did not indulge in an idle request for documents. Audio had expended time and effort on submitting technical and cost proposals, yet observed its offer being set aside for a more expensive version. Audio may well have wondered if the winning proposal was worth a high enough technical premium to displace its offer. The DAR provides for debriefing unsuccessful offerors, but the emphasis is on the deficiencies in the proposal of the offeror being debriefed:

While offerors should be informed of the areas in which their technical or management proposals were weak or deficient, point-by-point comparisons with the technical or management proposals of the other offerors shall not be made. Furthermore, debriefings shall not reveal: (i) trade secrets; (ii) privileged or confidential manufacturing processes and techniques; (iii) commercial and financial information which is privileged or confidential, including cost breakdowns, profit, overhead rates, and similar technical standing of competitors or the evaluation scoring.⁵⁴⁷

The issue, restated, is which disclosure policy will better preserve the integrity of the source selection process: nondisclosure of the details of the evaluation process including nondisclosure of a comparison of technical proposals and evaluative factors which proved dispositive in a given source selection; or detailed documentation and disclosure of the true basis of the award so that fraud, waste, abuse, and conflicts of interest may be exposed, combated, and eradicated. Exemption five permits elevation of the former policy interests.

The Fifth Circuit Court of Appeals had a recent opportunity to consider the same issues in Shermco Industries, Inc. v. Air Force.⁵⁴⁸ The Air Force had terminated a contract with Shermco, citing "quality problems," and had

resolicited. Shermco bid on the re-solicitation, but was informed that a competitor had submitted the low acceptable bid. Shermco protested to the Comptroller General, alleging that the original contract was wrongfully terminated by the Air Force; that "quality problems" were not in fact the true reason for cancellation of the original contract; and that the apparent winner of the re-solicitation not only did not submit the low bid but lacked capacity, credit, and capability to perform the contract.⁵⁴⁹ Shermco filed requests under the Information Act in a search for data to support its protest. Shermco was particularly interested in information pertaining to the apparent winner of the re-solicitation. Some of the requested documents were withheld under exemption four, and three legal opinions were withheld under exemption five. The Fifth Circuit measured the legal opinions against the deliberative memoranda portion of exemption five and did not reach the attorney work product rationale.⁵⁵⁰

Shermco illustrates once again the tension between competing interests: the need to protect pre-decisional advice and recommendations versus the need for an open acquisition policy to expose abuse of the source selection process. The district court determined that the legal opinions in question were written to assist the contracting officer in the source selection decision and were thus protected by exemption five--until the Air Force provided them to the Comptroller General pursuant to Shermco's protest.

In sending these documents to the GAO the Air Force made them part of the basis of its decision to award the contract to Tayko (a "final opinion" under the FOIA) and the Air Force waived its exemption. They were designed to explain the Air Force's decision to the GAO and bolster the Air Force's position. The documents became more than "mere" staff opinions submitted to an Air Force official for internal decision making--they became part of the "final opinion." I find that the three legal memoranda are releasable under the FOIA as they are part of the agency's "final opinion." ⁵⁵¹

Apparently, had the Air Force not provided the documents to the Comptroller General, the district court would have protected them as

predecisional deliberative material falling squarely within exemption five. The Fifth Circuit Court of Appeals, citing Sears, Grumman, and Audio, agreed with this part of the district court's analysis. However, the circuit court also noted that Sears required that pre-decisional documents be converted to post-decisional material only by being "expressly adopt(ed) or incorporate(d) by reference" into the final opinion.⁵⁵² The Fifth Circuit concluded that the test for incorporation had not been met since in light of the protest, there had been no final decision to award to anyone, and, for that matter, the legal memoranda had not been attached or expressly incorporated into even the proposed award decision. As to the effect of disclosure of the memoranda to the General Accounting Office, the Fifth Circuit Court of Appeals concluded that mere release to another federal agency did not serve to waive the Air Force's right to assert exemption five. The court noted that inter-agency memoranda are also protected.

By including inter-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency.⁵⁵³

Before leaving the deliberative portion of exemption five the views of the Department of Justice on providing litigation support, which were first described in Chapter Four, bear repeating here since the principal focus of the policy was exemption five. In May 1977 the Attorney General enunciated a "demonstrably harmful" test for its defense of data agencies wish to withhold: "The Government should not withhold documents unless it is important in the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act."⁵⁵⁴

This move to implement the spirit of the Information Act, though not limited to any single exemption, was directed primarily at what was perceived as excessive agency use of exemption five.⁵⁵⁵ The Department of Justice decision to defend agency withholding in court depends upon a consideration of the following criteria:

- (a) Whether the agency's denial seems to have a substantial legal basis,
- (b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,
- (c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and
- (d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.⁵⁵⁶

Thus, the Attorney General has in one sense imposed a sort of exemption four "substantial competitive harm" test on agency use of exemption five. Exemption four is concerned with substantive as opposed to nominal harm to a private business; exemption five is concerned with substantive as opposed to nominal harm to an agency's decision-making process.

The Attorney General's Information Act specialist, Mr. Robert Saloschin, has provided a twelve-point checklist to assist in the determination of the degree of harm to the decision-making process and thus the necessity to invoke exemption five:

- (a) What type of advice is involved? (Has the advice traditionally been considered confidential?)
- (b) What is the program or activity context in which the advice and the decision-making will occur? (Does deliberative material traditionally enjoy confidentiality?)
- (c) What is the decision-making procedure or methodology? (Is the source of the deliberative input independent or subordinate to the decision-making? The former source may require less protection than the latter.)
- (d) How old is the record in question? (The older the material, the greater the likelihood of disclosure having no effect on the deliberative process.)

(e) What is the status of the decision? (Mr. Saloschin argues that deliberative inputs may require greater protection prior to the final decision. While this may be true, protection of the decision-making process may require nondisclosure of inputs after the final decision as well as before.)⁵⁵⁷

(f) What is the status of the personnel? (The chilling effect of disclosure will vary with the vulnerability of advisors.)

(g) Is there reason to expect a "warming" effect. (The sources of deliberative material may not be affected by disclosure or may even welcome it.)

(h) Are the issues inflammatory? (The more inflammatory the issue, the greater the risk that disclosure will produce a chilling effect.)

(i) Are powerful pressures likely? (Are there groups which may attempt to punish advisors?)

(j) Is there an undue risk that the deliberative communication will be distorted or misunderstood?

(k) Is there an unusual "track record" for the particular kind of decision-making which is so highly successful (or highly unsuccessful) as to suggest that a change in the protection for deliberative expressions as part of the process of reaching such decisions would or would not involve much risk of harm?

(l) Where decision-making is oriented to interests partly or largely adverse to the agency, will release of particular deliberative matter impair agency strategies or weaknesses? (This factor is of particular importance in the acquisition process.)⁵⁵⁸

The Government's Commercial or Financial Information

Even under the above-described Department of Justice criteria, advisory material within the acquisition process not adopted or incorporated by reference into final decisions may find protection under exemption five. The rationale of Mink, Sears, and Grumman, though dealing with political and litigation scenarios, is translatable into the acquisition process. There is, however, another category of information which falls less in the "advisory" category than it does in a "commercial or financial information" category. This is government data which would be a candidate for exemption four protection if only it had been generated by private sources. The Defense Acquisition Regulation suggests such material may be protected under

exemption five:

Records which are received or generated by a department and which are preliminary to a decision or action, should not be released until such time as disclosure would not be detrimental to the authorized and appropriate purpose for which they are being used. For example, a copy of an IFB (Invitation for Bid) intended for public release at a particular time should not be released prematurely, although the document is in final form and ready for distribution. Similarly, advance information on proposed plans to procure, lease, or otherwise acquire or dispose of materials, real estate, facilities or functions should not be released, when such information would provide undue or unfair competitive advantage to private personal interests.⁵⁵⁹

The government's sensitive "commercial" data has generally been protected from disclosure, though the rationale has varied. The initial basis for protection was exemption four.⁵⁶⁰ When judicial decisions limited use of exemption four to nonfederal submitters⁵⁶¹ the rationale shifted to exemption five.⁵⁶² Until recently, there was no explanation of how this information fit into the traditional conception of exemption five: attorney-client material, attorney work product, or deliberative material. The deliberative material rationale did not fit such information well, but was not challenged since it was generally recognized that the government's "commercial" information was sensitive at certain stages and worthy of protection. Finally, in June 1979, the Supreme Court arguably provided legitimacy by expanding the reach of exemption five. The case was Federal Open Market Committee of the Federal Reserve System v. Merrill.⁵⁶³

Open market operations involve the purchase and sale of government securities in the domestic market. This instrument of national monetary policy is wielded by the Federal Open Market Committee. The FOMC's monetary decisions are recorded in a "Domestic Policy Directive" which is published in the Federal Register the month following the date it becomes effective. At this point of disclosure, the old directive has been superceded by a new directive. The requester in FOMC v. Merrill⁵⁶⁴ demanded that directives be released while still effective. The FOMC argued that release at this stage would produce an

immediate impact in the market as opposed to the desired gradual impact, that the impact might be uncontrollable, that large institutional investors would be provided an unfair advantage over small investors, and that disclosure would lead to burdening the Treasury with substantial additional borrowing costs.⁵⁶⁵ However, the requester, the federal district court, and District of Columbia Circuit Court of Appeals brushed aside as irrelevant the argument that disclosure would seriously disrupt open market operations.⁵⁶⁶ The circuit court's response to the "devastation" scenario is that Domestic Policy Directives must be disclosed under the Information Act, and if the economy will thereby be disrupted, then Congress should respond with exemption three protection.⁵⁶⁷

However, congressional assistance was not required to protect the Domestic Policy Directives. The Supreme Court noted that exemption five, in language at least, is defined in terms of federal rules of discovery. Federal Rule of Civil Procedure 26(c)(7) provides that

Upon motion . . . by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.⁵⁶⁸

The legislative history of exemption five did not explicitly link the exemption to the confidential commercial information language of the federal discovery rules. The Supreme Court forged the link. The Court began with the Information Act hearings. Testimony from the Department of Defense worried that information concerned with the purchase and sale of real estate and materials and other property might be disclosed.⁵⁶⁹ Testimony from the General Services Administration worried that information might be prematurely disclosed which could prejudice the government's bargaining position in business transactions.⁵⁷⁰ Testimony from Post Office representatives argued

that in matters such as contract negotiation, the government should enjoy the same data protection as private parties.⁵⁷¹ Then there was the Treasury Department's prophetic testimony:

Information as to purchases by the Federal Reserve System . . . of Government securities in the market, if prematurely disclosed could have, we feel, serious effects on the orderly handling of the Government's financing requirements so that in all of these things there is a question of timing. There are many things on which full disclosure is made in reports which are published or filed with the Congress with a timelag, there is no basic secrecy about these matters, and yet the premature release of these could be very damaging to the general interest.⁵⁷²

Before these hearings, the proposed language of what was to become exemption five protected internal memoranda "dealing solely with matters of law or policy."⁵⁷³ After these hearings, the Senate Judiciary Committee revised the exemption to protect internal memoranda undiscoverable in litigation.⁵⁷⁴ The legislative history included as part of the explanation for the revision this rationale:

Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.⁵⁷⁵

The Supreme Court found a limited privilege for confidential commercial information pertaining to government contracts from the hearings testimony, the revision of statutory language and concurrent committee analysis, and Federal Rule of Civil Procedure 26(c)(7). The discovery of a heretofore unknown branch of exemption five may require a leap of faith for some jurists. However, there is that relatively explicit language concerning commercial information in the federal discovery rules, and then there is that language in the legislative history of exemption five, quoted above, which seems to be worried not about predecisional, deliberative material, but about the government's negotiation posture and competitive disadvantage from premature disclosure. It might be

added that whatever leap of faith is required to embrace this extension of exemption five, it is perhaps similar in degree to that required to embrace the District of Columbia Circuit's "substantial competitive harm" test for exemption four material. The District of Columbia Court of Appeals seized upon a rigorous test for confidentiality which was not readily apparent to most submitters or for that matter to most jurists.⁵⁷⁶ However, as the District of Columbia Circuit might observe in defense of its National Parks decision, if the Supreme Court in FOMC v. Merrill has gone too far, then Congress, which has never hesitated to reassert its will in the freedom of information area, may either amend exemption five or enact a "reverse-exemption three" statute which commands the timely disclosure of Domestic Policy Directives.

Recognition of the exemption five potential of confidential commercial information was not dispositive in FOMC v. Merrill. The case was remanded to ascertain if immediate release of the Domestic Policy Directives will indeed significantly harm the government's monetary functions. A member of the Federal Reserve Board as well as Professor Milton Friedman are noted as favoring immediate release,⁵⁷⁷ so the issue is not necessarily a foregone conclusion.

The Government's "Trade Secrets"

The Merrill case provides a basis for nondisclosure of the government's "commercial or financial" information, at least during the stage that the data is sensitive. Thus, information concerning pre-solicitation and pre-award activities need not be disclosed prematurely. The government may enter the marketplace with acquisition intentions and bargaining position intact. However, there is a final category of government information which is what might be termed the government's "trade secrets," and consists of those formulae,

designs and drawings, research data and analyses, and computer programs which some departments such as the Air Force and Navy view as "valuable property" rather than "records" subject to the Information Act.⁵⁷⁸ This category of information is distinguishable from the commercial data at issue in Merrill.

As the Supreme Court noted,

The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such rationale expires as soon as the contract is awarded or the offer is withdrawn.⁵⁷⁹

In contrast, the classic example of a government "trade secret" has been the formula as the Federal Bureau of Engraving and Printing uses for ink and currency paper. The Attorney General's 1967 Memorandum offered an expansive exemption four as a haven from disclosure for the formulas:

It seems clear that applicability of this exemption should not depend upon whether the agency obtains the information from the public at large, from a particular person, or from within the agency. The Treasury Department, for instance, must be able to withhold the secret formulas developed by its personnel for inks and paper used in making currency.

An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that Congress intended . . . to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence such property in the hands of the United States should be covered under exemption (4).⁵⁸⁰

Though the necessity for nondisclosure is unquestioned, there is no legal basis to place Treasury formulas or other valuable data under the protection of exemption four. The latter exemption is clearly concerned with business data from private submitters,⁵⁸¹ not belonging to the government. Courts have almost unanimously supported this view,⁵⁸² and any lingering doubts on the issue were resolved by the Supreme Court in the Merrill case: "Exemption 4 . . . is limited to information 'obtained from a person,' that is, to information obtained outside the Government."⁵⁸³ However, this decision which closed the

door on use of exemption four, may arguably have opened the door for use of exemption five. Federal Rule of Civil Procedure 26(c)(7) addresses not only "commercial information" but also "trade secret or other confidential research (and) development" information.⁵⁸⁴

Such material is as sensitive in its own way as the government's "commercial" data. The need to protect certain research data may dissipate as technology moves forward, but other data, such as the Treasury Department ink and currency formulas, may require permanent protection. However, any such protection would represent an extension of Merrill, which limited its ruling to the conclusion "that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that the information is generated by the Government itself in the process leading up to awarding a contract."⁵⁸⁵ If the courts will not extend Merrill into the area of formulas and research data, such extension would be an appropriate consideration for legislative action. The final answer is by no means clear. Proponents of disclosure may argue that government-sponsored and government-generated formulas and research data, though not necessarily the type of material the Information Act was initially designed to expose, has nevertheless been paid for by the public and the public thereby has a right to access absent classification for purposes of national security.⁵⁸⁶

The Department of Defense, in the latest revision of its freedom of information regulation, may have provided the basis for protection of government "trade secrets" under exemption five. Added to its FOIA regulation is the following example of exemption five material:

Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other interests.⁵⁸⁷

One part of this example speaks of the premature disclosure of commercial information owned by the government which impacts the government's negotiating

posture or other commercial interests. This scenario falls squarely within FOMC v. Merrill. Such commercial information was discussed in the preceding section of this chapter. Protection under exemption five should be available. The other part of this example seems to go farther. It speaks of the premature disclosure of trade secrets and other confidential research developments having an impact on the government's commercial interests. Such language could arguably protect the Treasury Department's formulas for ink and currency paper and the Defense Department's formulae, designs and drawings, research data and analyses, and computer programs which are presently characterized as "valuable property" rather than "records."⁵⁸⁸ The justification for employing exemption five to protect the government's "trade secrets" might be found in Federal Rule of Civil Procedure 26(c)(7) and an extension of the Supreme Court's reasoning in FOMC v. Merrill.

CHAPTER SIX

PROCEDURAL CONSIDERATIONS

In calendar year 1977 two federal agencies distinguished themselves by making a profit on Information Act transactions. The Civil Aeronautics Board grossed \$111,508 in fees while costs totaled only \$100,000 and the Interstate Commerce Commission grossed \$5,565 against costs of \$4,148.⁵⁸⁹ However, these two experiences fall into the "man bites dog" category. In that same year all federal agencies reported Information Act implementation costs of \$25,953,317⁵⁹⁰ against total fees collected of \$1,366,886.70.⁵⁹¹ Costs are apparently increasing. A preliminary estimate of the cost of implementation of the Information Act in calendar year 1978 is \$47.8 million.⁵⁹² As recently as 1974 total program cost estimates were pegged at a mere \$40,000 a year by the Senate Committee on the Judiciary and at \$50,000 for 1974 and \$100,000 a year thereafter by the House Committee on Government Operations.⁵⁹³ This latter estimate of \$100,000 a year is the cost of implementation reported by NASA alone in 1977.⁵⁹⁴ Thirty-eight other offices, agencies, and departments reported the \$25.9 million in 1977 and the \$47.8 million in 1978 noted earlier.

The 1974 Amendments to the Information Act provide that each federal agency shall publish a uniform fee schedule, shall charge only for document search and duplication, and shall waive all fees when filling requests deemed to be in the public interest.⁵⁹⁵ Thus, for example, the time of FBI agents who spend many hours scrutinizing records to distinguish releasable from non-releasable matter is not chargeable.⁵⁹⁶ Similarly non-chargeable is the time of the contracting officer or project engineer (and the submitting contractor) who must review multi-volume technical, management, and cost proposals to

distinguish the releasable from the non-releasable. The Department of Defense has effectively decided to stop charging even search and duplication costs to most requesters. As of March 24, 1980, all fees under \$30.00 have been automatically waived.⁵⁹⁷ Of course, DOD documents are not being provided free of charge, the cost has merely been shifted from requesters to taxpayers. Most agencies already provide for waiving fees (generally under \$3.00) if collection costs will exceed the fees. It may well be that a more open government is worth whatever the cost, or that the assault on government secrecy is worth at least 50 million dollars, particularly in light of the government's multi-billion dollar budget. In fact, the millions spent may be viewed as a measure of both the interest in the contents of government filing cabinets and the efforts that agencies are expending to implement the Act.

Each federal agency has established its own unique organizational structure to implement the Information Act. Generally there is a releasing authority, such as the head of a field unit, with the authority to fill requests; a denial authority who is at a higher level in the agency hierarchy, with the power to make the initial agency determination to deny all or part of a request; and an appellate authority, the secretary of the agency or a designee at the highest agency level, who makes the final agency determination to fill or deny a request. As might be expected, an agency's peculiar Information Act structure is a function of its organization. To illustrate, the structures of several agencies will be outlined, then the organization of one agency will be examined in greater depth. For example, the General Services Administration is organized into a Central Office in Washington, D.C. and ten regions. The GSA's administrative monitor for the Information Act is the Director of Information at the Central Office and the Directors of Business Affairs at the regional offices. Requests are received by these offices for administrative control, then forwarded to those offices having custody of the records. Officials in

the custodial offices are the releasing authorities.⁵⁹⁸ Initial denial authorities are the occupants of sixteen high level positions in the Central Office and the Regional Administrators at the ten regions.⁵⁹⁹ The GSA Deputy Administrator makes the final agency determination on appeals.⁶⁰⁰

The National Aeronautics and Space Administration has identified Information Centers at NASA headquarters in Washington, D.C. and at ten research centers and laboratories around the country, and also at the NASA Resident Procurement Office in Pasadena, California.⁶⁰¹ The Information Centers provide administrative control over the requests. The Director or Official-in-Charge of NASA field installations makes the initial determination to release or deny a request.⁶⁰² Thus, release and denial authority is vested in the same high field official (or designee such as the principal Public Affairs Officer). The Associate Deputy Administrator of NASA makes the final determination on appeals after consulting with the General Counsel and the Assistant Administrator for Public Affairs.⁶⁰³

Even within the Department of Defense there are some differences in procedural implementation, born of varying organizational structures and secretarial preferences in the allocation of responsibilities. In the Navy, the commanding officers and heads of all departmental and field activities are authorized to release records. Denial authorities are explicitly designated officials, including, for example, the Chief of Naval Operations, the Commandant of the Marine Corps, the Chief of Naval Materiel, the Chief of Naval Personnel, and commanders of naval system commands and naval districts.⁶⁰⁴ The Secretary of the Navy has authorized The Judge Advocate General of the Navy and the General Counsel of the Navy to make the final agency determination on appeals.⁶⁰⁵ The subject matter of the request identifies which agency appellate authority will act. For example, the General Counsel of the Navy is the exclusive appellate authority for requests of Navy acquisition records.⁶⁰⁶

In the Army, custodial offices may release records in their possession.⁶⁰⁷ Initial denial authorities are organized by field of interest: for example, the Surgeon General acts on requests for medical records, the Chaplain acts on requests related to the clergy, the Comptroller of the Army acts on requests for finance and accounting records, and the Commanding General of the United States Army Materiel Command is the denial authority for all requests involving Army acquisition records.⁶⁰⁸ All appeals to the Secretary of the Army for a final agency determination are through the General Counsel of the Army.⁶⁰⁹

Though there are some differences in the Air Force's Information Act apparatus, the similarities to other agencies appear more significant than the variations. A closer look at the Air Force implementing structure may prove instructive. The Air Force is composed of 134 major installations in the United States and overseas.⁶¹⁰ These installations are organized into twelve major commands (MAJCOMs) and twelve separate operating agencies (SOAs). Examples of MAJCOMs include the Strategic Air Command, Air Force Logistics Command and Air Force Systems Command; examples of SOAs include the Air Force Engineering and Services Agency, Air Force Inspection and Safety Center, and the Air Force Test and Evaluation Center. Air Force regulations identify the release authority as the chiefs of offices at directorate or higher level at Headquarters, United States Air Force and commanders at MAJCOMs and SOAs.⁶¹¹ However, reserving the initial disclosure decision at this level would be burdensome so regulations provide that release authority may be delegated to directorates at MAJCOM headquarters and to wing and base and comparable commanders.⁶¹² Release authority has been so delegated to field commanders. Initial denial authority, however, is not delegable to a lower level, and is retained by the Deputy Chief of Staff and chiefs of comparable offices at HQ USAF and by commanders of MAJCOMs and SOAs.⁶¹³ A final determination to deny a request at the MAJCOM

level may be appealed to the Administrative Assistant of the Secretary of the Air Force who makes the final agency determination.⁶¹⁴

In calendar year 1978 all Department of Defense organizations⁶¹⁵ reported 56,466 Information Act requests.⁶¹⁶ The Air Force share of this total was 22,270. The Air Force denied or partially denied 853 requests, or 3.8 percent.⁶¹⁷ The following chart reveals Air Force denial rates and the treatment of appeals over a four-year period.⁶¹⁸

Year	Number Denied	Percent Denied	Number Appealed	Appeals		
				Denied	Partially Denied	Granted
1975	2,492	3	110	-	(unavailable)	-
1976	2,652	17	188	113	63	12
1977	2,242	12	162	56	96	10
1978	853	3.8	190	121	60	9

The exemptions most often employed by the Air Force to support denials were (b)(5) (internal memoranda), (b)(6) (personnel and medical and similar records), and (b)(4) (business data), in that order. In an acquisition-oriented MAJCOM such as Air Force Systems Command, the order of use was (b)(4), (b)(5), and (b)(6). In addition to the denials based on exemption, the Air Force did not fill another 2,020 Information Act requests. In these cases, the Air Force either did not have the requested records (1,312 cases in 1978), forwarded the request to another agency for processing (235), the requester failed to comply with the procedures on fee payment (222), the requester failed to reasonably describe the desired records (149), or the request was withdrawn (102).⁶¹⁹

Tracing a hypothetical request through the Air Force organizational structure will illustrate how the mechanism works. Assume that a request for a copy of a recently awarded contract and for the cost and technical proposal of the winning offeror is received by an Air Force Systems Command contracting center, the Rome Air Development Center, located at Griffiss Air Force Base, New York. The request is in writing and reasonably describes the desired records. The request will typically be received by the principal contracting

officer or perhaps by the command section or the Director of Administration. The latter (or counterpart) is responsible for the administration of the program at each echelon (field, MAJCOM, HQ USAF), so a request which is sent to any other office in the Center will be hand carried to the Freedom of Information (FOI) Manager in the Office of the Director of Administration. The FOI Manager will assign the request a number reflecting the year and number of requests received (such as 80-001 for the first request in CY 1980) and enter it into a log book. Then the request will be hand carried to the principal contracting officer (PCO) of the contract in question, since that individual serves as the records custodian. The PCO and perhaps a supervisor will be making an independent recommendation to the Center Commander, the releasing authority, as to whether the requested documents should be released. The PCO will call the submitter of the records, the winning offeror in this hypothetical case, for an input. Typically, a submitter will object to the release of anything, but when reminded that all reasonably segregable, nonexempt portions of documents must be released, submitters will normally assist in identifying the truly sensitive portions and articulating just how substantial competitive harm will flow from disclosure. Occasionally, submitters will confess to no interest in documents as to which an exemption could arguably have been supported. Such documents will be released. If necessary, the PCO will solicit an input from the Center Program Manager (CPM).

With the submitter's input, the PCO, often with the assistance of a supervisor, will provide the FOI Manager with a disclosure recommendation. For example, the recommendation may be to release a copy of the contract, assuming it to be unclassified, to withhold the bulk of the cost proposal as containing sensitive cost burdens and rates, and to withhold those portions of the technical proposal which describe unique approaches and ideas and which describe in detail personnel resources and plant and equipment resources not otherwise

available. The FOI Manager will obtain an opinion from the Staff Judge Advocate's office as to the propriety of withholding portions of the cost and technical proposals, then will provide the case file to the local releasing authority, the Center Commander. At this point the case file will contain the original request, the custodian's recommendation (PCO/CPM), an indication of the submitter's input, a judge advocate opinion (if a partial or full denial is contemplated), and a copy of all of the documents requested.

The Center Commander may decide to release all of the requested documents. In this event the submitter will be informed if the submitter had objected to release. Normally, the Commander will adopt the recommendations hammered out by the FOI Manager, the PCO, and counsel. In this hypothetical case, the recommendation was a partial denial, so the entire case file will be forwarded by the Center Commander to the denial authority at the MAJCOM, Air Force Systems Command, located at Andrews Air Force Base, Maryland.

The 1974 Amendments to the Information Act require that the names and titles of all persons who have denied records during the past calendar year be forwarded to Congress.⁶²⁰ In calendar year 1978 the Air Force reported 111 individuals with the authority to deny records. Of the 111 only 64 had actually denied any requests that year, and only nineteen had denied over ten requests. Of the 64 initial denial authorities, 32 were of general officer rank, 28 were full colonels, and the remaining four were lieutenant colonels. At Air Force Systems Command where the hypothetical partial denial has been forwarded, four IDAs have been appointed: the major general who serves as the Deputy Chief of Staff for Procurement and Manufacturing, the full colonel who serves as the Assistant Deputy Chief of Staff, the full colonel who serves as the Director of Administration, and the lieutenant colonel who serves as the Deputy Director of Administration. The recommendation for a partial denial will be received by the FOI Manager at Systems Command, logged in, then forwarded to the

contracting directorate and servicing legal office for evaluation. The denial authority may release all of the requested records, or may partially deny the request, or may deny the request altogether. If the decision is to release anything, those records are forwarded to the requestor at this point, and in the latter two cases (partial denial or full denial) the requester is advised of the right to appeal within 45 days of receipt of notice of the denial.⁶²¹ The submitter has no agency appeal rights, but should be advised of any impending release if the submitter posted objections. The submitter may wish to seek judicial review of the decision to release and injunctive relief.

Any appeal by the requester is to the Administrative Assistant to the Secretary of the Air Force, but is forwarded through the MAJCOM which partially or fully denied the request, in this case Air Force Systems Command. The MAJCOM may reverse itself and release the requested records, or may forward the request to the litigation staff of The Judge Advocate General of the Air Force (HQ USAF/JACL). Air Force attorneys who specialize in freedom of information will review the appeal and have the authority to release the requested records.⁶²² If denial appears to be appropriate, the litigation division may coordinate the matter at this point with the Freedom of Information Committee of the Justice Department's Office of Information Law and Policy.⁶²³

If the litigation division of The Judge Advocate General's Office recommends denial, the appeal is then forwarded to the Office of the General Counsel of the Air Force where an attorney specializing in freedom of information will review it. If the OGC concurs in the denial, the appeal will be forwarded to the Administrative Assistant to the Secretary of the Air Force (SAF/AA). The Administrative Assistant or a designated deputy will make the agency's final determination. If the response to the request is a denial or partial denial the letter to the requester will advise of the right to a judicial review of the agency decision. This will conclude the agency phase

of the FOIA procedure. Several facets of this administrative procedure warrant separate examination: (1) agency notice to submitters of requested records; (2) the Vaughn v. Rosen⁶²⁴ index; and finally, (3) timeliness and the exhaustion of agency administrative procedures. A formal Vaughn index is normally an element of the litigation stage, but may also be of interest at the agency level. Each of these topics will be dealt with below, then the remainder of the chapter will consider judicial review from the viewpoints of both the requester and the submitter.

Notice to the Submitter

Substantive due process was briefly discussed in Chapter Four.⁶²⁵ That issue centers on whether it may be argued that disclosure of proprietary data under the Information Act constitutes an uncompensated taking of property forbidden by the Fifth Amendment. The other side of the coin involves procedural due process. In Goldberg v. Kelly,⁶²⁶ a case involving the denial of welfare benefits, the Supreme Court outlined the full complement of procedural due process protection: (1) timely and adequate notice, (2) confronting adverse witnesses, (3) oral presentation of arguments, (4) oral presentation of evidence, (5) cross-examination of adverse witnesses, (6) disclosure to the claimant of opposing evidence, (7) the right to retain an attorney, (8) a determination on the record of hearing, (9) a statement of the reasons for the determination and an indication of the evidence relied on, and (10) an impartial decisionmaker.⁶²⁷ The amount of procedural due process to be provided is not a constant. The denial of certain benefits or imposition of certain penalties may warrant the full panoply of procedural rights, while other proceedings of lesser import may require only minimal procedural safeguards. As the Supreme Court observed in Morrissey v. Brewer, "it has been said so often by this Court and others as not to require citation of

authority that *due process* is flexible and calls for such procedural protections as the particular situation demands."⁶²⁸ The Information Act itself provides for no procedural safeguards to protect submitters. The popular view among commentators is that even mere notice to submitters is not required, either constitutionally or statutorily.⁶²⁹ This view is the product of a small handful of court cases which have briefly addressed the procedural due process issue. There is a distinction, however, between the judicial rejection of submitter claims for additional due process, and the conclusion that submitters need not be afforded even minimal due process. The necessity for a modicum of process is implicit in a judicial conclusion that no further process is required. Several FOIA cases will illustrate the point.

The case of Pharmaceutical Manufacturers Association v. Weinberger⁶³⁰ involved a challenge of the Food and Drug Administration's Information Act regulations. These regulations provided for advance determination of releasability, notice to submitters of requests, and an opportunity to be heard in uncertain cases.⁶³¹ The court concluded that these provisions provided adequate due process protection.⁶³²

Similarly, the district court in Chrysler Corporation v. Schlesinger⁶³³ considered Chrysler's claim that Information Act regulations of the Office of Federal Contract Compliance Programs were violative of Fifth Amendment due process requirements. The applicable OFCCP regulations provide that equal employment data is subject to the Information Act, that contractors may identify data believed to be nondisclosable and provide the rationale for nondisclosure, that the agency will then make a disclosure/nondisclosure determination within ten days and inform the contractor, and that the contractor may appeal an adverse determination.⁶³⁴ The applicable regulations of the OFCCP compliance agency, the Defense Supply Agency (now Defense Logistics Agency), provide that:

When a request is received for records which were obtained by DSA from a non-U.S. government source; or contain information obtained by DSA from a non-U.S. government source and because of the source and the nature of the records or information, there is reason to believe that the source of the information or records may object to release and may have an enforceable right to prevent release, prompt notification of intended release shall be given to the source. Release will normally be withheld until the source has a reasonable time to comment on the proposed release. Comments received will be considered in determining the releasability of the document. When the source advises that it is seeking a restraining order or other court action to prevent release, release will normally not be made pending the outcome of the court action.⁶³⁵

Finally, the district court observed that the final agency decision is reviewable under the Administrative Procedure Act.⁶³⁶ Concluding that the Fifth Amendment requires no more than notice and some sort of hearing before the government deprives a corporation of property, the court found that the submitter had been afforded adequate process.⁶³⁷ On appeal, the Third Circuit Court of Appeals briefly considered Chrysler's due process claim. The Third Circuit concurred with the district court that the agency regulations and administrative and judicial review provide ample due process.⁶³⁸

Equal employment information was also at issue in United Technologies Corporation v. Marshall.⁶³⁹ After considering the procedural due process arguments of the submitter, the district court concluded not that due process was unnecessary but instead that due process had been afforded.

The OFCC afforded Pratt & Whitney notice of the proposed disclosure and an opportunity to make a written submission of the reasons for its objection to disclosure. Furthermore, the agency provided an administrative appeal and a detailed written decision stating its rationale for rejecting those objections, which was then subjected to judicial review in this Court. Thus Pratt & Whitney was given notice of the proposed action and an opportunity to be heard. Due process requires nothing more.⁶⁴⁰

Pharmaceutical Manufacturers, Chrysler, and United Technologies do not stand for the proposition that submitters need not be afforded due process. The procedural due process provided the submitters in those cases passed constitutional muster. Full evidentiary hearings at the agency level were not deemed necessary; however, had notice, an opportunity to comment, and judicial

review not been available, the courts may well have come to different conclusions on the due process issue.

In Mathews v. Eldridge,⁶⁴¹ the Supreme Court provided a framework for analysis of the adequacy of due process. Three factors must be evaluated to ascertain due process requirements: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."⁶⁴² Government violation of a liberty or property interest is necessary to invoke Fifth Amendment due process protection. The courts in Pharmaceutical Manufacturers, Chrysler, and United Technologies assumed, without discussion, that government disclosure of a submitter's data involves a private property interest. This is a reasonable conclusion in light of the rigorous test for defining the exempt status of business data. Submitters will be claiming that disclosure of the data in question would likely result in substantial harm. Absent appropriate due process, the risk of an erroneous deprivation is not minimal. Release authorities are highly decentralized and may not be sensitive to the injury to competitive position which can result from data disclosure. Without notice to submitters, releasing authorities acting unilaterally may disclose sensitive business data, and thereby moot judicial review under the Administrative Procedure Act. Finally, the administrative burden which due process places on agencies cannot be ignored. The administrative burden the Information Act now places on agencies is considerable. Provision for a full evidentiary hearing at the agency level would create an onerous burden for agencies. However, in the area of business data, notice to submitters and an opportunity to be heard provided

at the agency level would not subvert the process. Experience in acquisition-oriented agencies which now routinely provide notice to submitters of business data demonstrates that providing a modicum of process is feasible. A submitter's input is vital to both the agency decision and creation of an agency record suitable for judicial review under the Administrative Procedure Act. The Mathews v. Eldridge⁶⁴³ framework of analysis suggests that notice to business data submitters of the receipt of Information Act requests, a meaningful opportunity for submitters to be heard at the agency level, and the opportunity to invoke judicial review prior to disclosure provide adequate due process.

Constitutional issues aside, many agencies provide for notice to submitters in their regulations, and the Office of Information Law and Policy of the Department of Justice recommends that all agencies provide timely notice, containing at the minimum:

- (1) (A) detailed description of those documents within the scope of the FOIA request,
- (2) (T)he data on which the agency desires to make its determination whether or not to disclose all or portions of the requested information;
- (3) (A) request that the submitter provide the agency with any written objection to disclosure, in the form of a detailed identification of each portion of the requested information which the submitter would have the agency withhold, together with specific explanations of all factors weighing in favor of withholding; and
- (4) (A) request that the submitter provide a sworn statement indicating whether or not any portion of the requested information has, to the knowledge of the submitter, been revealed to any person not employed by the submitter or to any other agency.⁶⁴⁴

Furthermore, the Office of Federal Procurement Policy, after coordinating with the Justice Department, disseminated to all agency heads a policy letter containing this plea: "You are requested, on receipt of a Freedom of Information request for information, submitted by a contractor or potential contractor, that may fall within exemption 4 to: (1) immediately notify the submitter of

the information of the request and afford the submitter an opportunity to present its views on whether disclosure should be made"645

In the hypothetical Information Act request to the Air Force for acquisition records (for the contract and winning cost and technical proposal) discussed in the preceding section notice to the submitter would probably have been provided. Department of Defense regulations, at least since 1975, have provided for notice to submitters. The latest characterization of the notice requirement provides that

When a request is received for a record that was obtained from a non-U.S. Government source, or for a record containing information, clearly identified as having been provided by a non-U.S. Government source, the source of the record or information normally shall be notified promptly of that request and afforded reasonable time to present any objections concerning the release unless it is clear that there can be no valid bases for objection. If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated when a substantial issue has been raised, the DOD Component may seek additional information from the source of the information and afford the source and the requester reasonable opportunities to present their arguments on the legal issues involved prior to making an agency determination. When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request normally shall not be taken until after the outcome of that court action is known.⁶⁴⁶

Even absent the constitutional due process impetus and agency regulations, notice to contractor-submitters is an integral part of agency Information Act procedures. An agency can never assume what portions of records a submitter will abandon and what portions a submitter will retain counsel to protect. Furthermore, the agency needs the submitter's input. The submitter possesses the knowledge necessary to ascertain the competitive implications flowing from disclosure of certain data. The submitter has the familiarity with voluminous records to pinpoint those portions for which a claim of privilege may be made. An even-handed implementation of the Information Act calls for timely notice to submitters, a meaningful opportunity for

submitter comment, and temporary withholding sufficient to enable submitters to seek judicial review.

The Vaughn Index

A 1973 District of Columbia Circuit Court of Appeals case, Vaughn v. Rosen,⁶⁴⁷ has had considerable impact on Information Act procedures at the litigation stage and arguably at the agency level. A law professor conducting research on the Civil Service Commission was denied a number of requested documents by the agency. Denial was based on exemptions two, five, and six. The district court granted summary judgment to the agency based on an affidavit submitted by a government official. On appeal, the court essayed at length on the disadvantaged position of the requester vis-a-vis the government.

(I)t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information.

.....

Here the Government contends that the documents contain information of a personal nature the disclosure of which would constitute an invasion of certain individuals' privacy. This factual characterization may or may not be accurate. It is clear, however, that appellant (requester) cannot state that, as a matter of his knowledge, this characterization is untrue. Neither can he determine if the personal items, assuming they exist, are so inextricably bound up in the bulk of the documents that they cannot be separated out. The best that appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information.

.....

This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible.⁶⁴⁸

Thus, the court perceived the requester as being at a decided disadvantage in the legal arena. The court did not consider in camera examination by the trial judge to be a complete answer to the requester's disadvantage, noting that in the instant case documents consisting of hundreds of pages were being withheld thereby necessitating a page-by-page examination

to identify segregable nonexempt portions.

Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible. The burden has been placed specifically by statute on the Government. Yet under existing procedures, the Government claims all it needs to do to fulfill its burden is to aver that the factual nature of the information is such that it falls under one of the exemptions. At this point the opposing party is comparatively helpless to controvert this characterization. If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation. This is clearly not what Congress had in mind.⁶⁴⁹

What the court had in mind has become known as the Vaughn index or matrix. Conclusory or generalized allegations of exemption were declared unacceptable. Six years later the same court in another Information Act case outlined the three "indispensable elements" of a Vaughn index:

- (1) The index should be contained in one document, complete in itself.
- (2) The index must adequately describe each withheld document or deletion from a released document.
- (3) The index must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant. (The explanation) . . . must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA.⁶⁵⁰

It is necessary to identify the material to be withheld, to identify the applicable exemption from mandatory disclosure, and to indicate just how the material fits into the exemption. The form of the index is less important than the substance of it. Voluminous material requires an index or matrix of some sort tying the specific withheld portion of a document to a specific exemption and justification. For example, in Vaughn v. Rosen itself, the agency was attempting to withhold documents containing "many hundreds of pages" under three exemptions.⁶⁵¹ The single affidavit tendered by the government, employing conclusory terms, was insufficient to clarify just what was being withheld, under what exemption, and why. Four years later the same court concluded that two affidavits were provided in sufficient detail to support the nondisclosure of seven documents under exemption five.⁶⁵² In another case the same court found that a single affidavit supported the nondisclosure of twenty-three

pages in one document under two exemptions:

The CIA's affidavit lists the deletions; provides a "relatively detailed analysis" of the material deleted; makes clear which exemptions are claimed for the deletions (Exemptions 1 & 3); and explains why the deleted material fits within the exemptions claimed (*i.e.*, how the deletions relate to "national security" and "intelligence sources and methods"). The CIA's justifications, we think, could not have been much more detailed without "compromis(ing) the secret nature of the information." Although the Agency did not tender its analysis in the form of an "index," it satisfied the "detailed justification," "specificity," and "separation" requirements whose satisfaction the Vaughn index was meant to insure. Although we do not retreat in the least from our belief that an index is of great assistance to requesters and courts in appropriate cases, common sense suggests that an index was unnecessary for the 23 pages that were so specifically described and justified here.⁶⁵³

A Vaughn index is not necessarily the complete answer to the requester's problem of fashioning arguments for the release of material which the requester has never seen. Requesters routinely argue that any government affidavits submitted provide an inadequate substitute for a true Vaughn index, and that any Vaughn index submitted is too conclusory and requires greater detail in describing the withheld material and in justifying the claimed exemption. Other devices include in camera examination of withheld records at the district court's discretion⁶⁵⁴ and appointment of a special master by the court to examine and evaluate voluminous documents.⁶⁵⁵ The District of Columbia Circuit Court of Appeals in Cuneo v. Schlesinger,⁶⁵⁶ decided two weeks after Vaughn, characterized the indexing procedures as "an experiment to be tried by experience."⁶⁵⁷ The experiment seems to have been broadly adopted, and today the "Motion Under Vaughn v. Rosen to Require Detailed Justification, Itemization and Indexing" is a standard Information Act motion when an acceptable index has not been tendered to requester.⁶⁵⁸ On the occasion of the 1974 Information Act amendments, the Senate Report noted the Vaughn decision and indicated support for the indexing requirement.⁶⁵⁹ It is the agency, of course, which bears the brunt of this procedure which has found such favor with requesters, courts, and Congress. The Vaughn court recognized that the

procedural requirement handed down might impose a "substantial burden" on the agency. The court simply preferred for the burden to reside on the agency rather than on the requester. The court was pragmatic concerning the potential effect of such a burden:

Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution--for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.⁶⁶⁰

The Vaughn index does assist in focusing agency attention away from broad claims of exemption for whole documents in conclusory terms toward the philosophy of the Information Act which provides that everything shall be released save for finite, comprehensible portions which will escape mandatory disclosure only on the wings of an applicable exemption. If a Vaughn index is necessary for the litigation phase of an Information Act request, what of the agency administrative phase? Whatever benefits accrue from linking finite portions of material to specific exemptions with a supporting rationale would be equally important at the agency level. The index is a procedural device to carry out the Act's philosophy of disclosure. If the requester needs the device to effectively litigate the withholding of material, for the same reasons a requester should need the device to effectively appeal to the secretary of an agency. This issue arose, briefly, in Mead Data Central, Inc. v. Air Force.⁶⁶¹ The Air Force withheld from Mead Data seven documents under exemption five. Seeking these documents in court, Mead Data argued that since the Air Force had failed to comply with Vaughn v. Rosen at the administrative level, the Air Force should not be allowed to cure this defect after suit is filed. Mead Data demanded that the court not consider "supplemental description" supplied by affidavits in an attempt to comply with Vaughn.⁶⁶²

On the way to concluding that the affidavits did comply with Vaughn, the court observed that

We agree with Mead Data that the objective of the Vaughn requirements, to permit the requesting party to present its case effectively, is equally applicable to proceedings within the agency. We cannot agree, however, that failure to follow those procedures in the administrative review of a FOIA request is a valid reason for an appellate court to reverse the judgment of a district court that the requested information is exempt, where those requirements have been satisfied in the district court proceeding.

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We do not excuse the Air Force's failure to provide Mead Data with sufficient detail about the nature of the withheld documents and its exemption claims at the administrative level, but for purposes of this case those inadequacies are irrelevant."⁶⁶³

Thus, the court in Mead Data saw merit in the use of a Vaughn index at agency level proceedings, but would not direct its use. A Vaughn index may appear, for the first time, after suit is filed. If the index is deemed inadequate, the requester will seek a proper Vaughn index by motion. Recently, a district court judge apparently grew tired of inadequate indexes and the attendant delays involved in extracting proper ones and ordered disclosure of all requested documents.⁶⁶⁴ The agency was given no opportunity to revise the index. This is a harsh remedy which could lead to the release of sensitive material exempt from mandatory disclosure. The substantive policy interests behind any such exemptions will have been subordinated to the procedural mechanism. It remains to be seen whether such an order will survive on appeal or will find favor in other courts.

The central point, however, is that the Vaughn index, though not mandatory, may be useful prior to the litigation stage.⁶⁶⁵ Of course, as noted above, a formal index or matrix is not always necessary; often a memorandum providing the Vaughn level of detail will suffice. Use of an "index" forces the agency to focus on the necessity for a rational linkage between material and exemption. Employing such a focus, the agency may release more material.

The requester with an "index" or its substitute may not appeal, or if an appeal is nevertheless filed, may be able to focus the issues sufficiently that a subsequent lawsuit becomes unnecessary. If a lawsuit is deemed necessary, fewer documents may be left in issue. An agency cannot comply with the Information Act without generating an analysis that complies with Vaughn. Thus, providing Vaughn-level data to the requester should create few problems for the agency complying with the Information Act. In fact, Air Force guidance provides that a Vaughn "analysis and presentation should be accomplished, to the greatest extent possible, as part of the initial processing of a FOIA request when records, or portions of records, are to be denied."⁶⁶⁶

The court in Mead Data did not hesitate to conclude that the absence of a Vaughn index at the agency administration level was of no consequence to the district court proceedings.⁶⁶⁷ The reason for this conclusion is in a requester's suit for disclosure the proceedings are de novo. The agency's decision below is not being reviewed, as it is in a submitter's suit to block disclosure. A Vaughn index is merely of assistance at the agency level, then mandatory at the litigation stage. However, the Vaughn "level of analysis" is vital at the agency stage when a submitter claims an exemption for certain data, for the agency analysis and conclusion to nevertheless disclose that data is reviewable. This agency duty is characterized in reverse-FOIA suits as the burden to construct an adequate administrative record, suitable for Administrative Procedure Act review under the "arbitrary, capricious, . . . abuse of discretion or otherwise not in accordance with law" standard.⁶⁶⁸ The normal scenario begins with a request for records, for example, a technical proposal. The submitter is telephoned and informed of the request by the principal contracting officer. The submitter typically claims that the entire proposal is sensitive and exempt for disclosure. The PCO should demand that

the submitter specify what portions are sensitive and why with a follow-up by telegraph or teletype. The PCO has just elicited a Vaughn analysis from the submitter. If the agency is convinced the material should be withheld it will similarly have performed a Vaughn analysis, whether or not a formal Vaughn index is constructed at this stage. If the agency decides the material should be disclosed over the submitter's objections, it should chronicle its rationale. The agency is in the requester's posture at this point, having solicited a Vaughn analysis from the submitter to focus the issues. The agency has been building a record suitable for review from the point the request was received. The administrative records will consist of the request, the submitter's Vaughn analysis, and the agency's rationale for rejecting the submitter's input as well as any other potential exemptions fairly raised by the nature of the requested material. One commentator lists the contents of an "ideal" record, suitable for judicial review:

The simplest way in which to proceed is for an agency official to prepare an affidavit after the reverse suit has been filed. It should detail the factual evolution of the case; state what factors were considered by the agency in reaching its decision; explain the legal standard applied; and have appended all relevant correspondence. For example, these exhibits would include the FOIA request; the letter notifying the submitter of the request; the submitter's response; a memorandum for record describing the informal administrative hearing; a detailed letter to the submitter informing him of what information the agency had decided to disclose, with the scheduled date of disclosure indicated; and the agency's response to the requester. It is also helpful to attach copies of all applicable agency regulations and representative copies of the documents in question.⁶⁶⁹

The Department of Justice has published similar guidance:

For litigation the agency needs to prepare a certified administrative record with all correspondence and other necessary documents to assist the Department of Justice in defending agency decisions to disclose privately generated information.

. . . .

At a minimum, copies of the following documents should be included as part of the certified administrative record:

- *the FOIA request;
- *the agency's notice to the submitter;
- *any comments by the requester on the submitter's arguments;

- *the final agency decision; and
- *the requested records marked to indicate those portions which the agency decided to disclose. (This last item of the administrative record may be filed in court under seal.)

In making all of the above determinations, it is vital to create an adequate administrative record of the agency's work on the request and on the submitter's objections. There has been great difficulty in the past in having agency disclosure decisions affirmed by the courts because the courts have insisted on the agency's ability to document its consideration of the arguments for and against disclosure, and to explain adequately the bases of agency action (I)t is necessary that the administrative record supporting the agency's action show that the agency adequately considered all issues and reached a reasonable decision which can withstand judicial scrutiny.⁶⁷⁰

Notice that the first list spoke of a "letter notifying the submitter of the request," and of a letter to the submitter detailing the material to be disclosed. The second list spoke of "comments by the requester on the submitter's arguments." One who notifies a submitter of an Information Act request by letter and who informs a submitter of an impending disclosure by letter has abandoned all thought of achieving the Act's time standards. In the acquisition arena, where buyers and PCOs often conduct business over the telephone, including the negotiating of contracts, time standards may be met by providing the submitter notice of a request and of the disclosure decision by telephone (or telegraph or telefax). Timeliness is the subject of the next section of this chapter. Whether a requester should have an opportunity to evaluate the submitter's input at the agency level, as the second list suggests, and the nature of the agency "hearing" required to effectively cope with the agency portion of an Information Act request, are two issues that often surface. These two issues, as well as whether the submitter should have the right to an agency appeal, will complete this section.

Now that submitters generally, at least in acquisition circles, are provided notice of requests for potentially sensitive documents and an opportunity to be heard in defense of nondisclosure, requesters generally may feel left out of the process. There is often a dialogue going on between

submitter and custodian, and the requester is not part of it. However, the administrative process could easily become unduly burdened if, for example, a PCO were to call a submitter and elicit a Vaughn "analysis", and then had to call the requester and discuss the submitter's rationale for nondisclosure, and then had to bring the requester's rationale for disclosure to the attention of the submitter, and so on until the issues had been fully aired. Such procedures would constitute an administrative nightmare. Perhaps a moderate course of action would be to allow the requester a single "cut" at the submitter's input. However, even this would add another largely unnecessary layer to an already burdensome administrative process. The requester should be informed of the reasons for nondisclosure by the initial denial authority. If the requester is unsatisfied with the rationale for nondisclosure, the Information Act provides for appeal to the head of the agency.⁶⁷¹ At this point the requester may marshal arguments for disclosure and attempt to demonstrate the invalidity of the custodian's rationale, including the deficiencies of any of submitter's arguments adopted by the agency. Requesters may prefer to interact in the disclosure determination process at the release authority or initial denial authority level, and an agency dealing with a complex request may indulge the requester. However, the right to appeal is normally an adequate remedy to the requester's need for an input at the agency level. Other requester inputs prior to the appeal stage should be left to the discretion of the agency, and granted on a case-by-case basis.⁶⁷²

A related issue is the extent of agency "proceedings". The administrative process could be quite formal, involving a full hearing with the presentation of evidence and argument before an administrative law judge. However, live testimony, cross examination, and the other indicia of a full evidentiary hearing would serve to balloon both the resources committed to

implementing the Information Act and the time to reach a final agency decision. There has been no demonstration that such formal administrative proceedings are necessary. Curing defects in the present, informal agency proceedings would better conserve the taxpayer's dollar. The system has manifested a capacity to respond to defects. For example, though notice to submitters is not a part of the Information Act, notice of requests for acquisition records is generally supplied. A formal apparatus would not significantly enhance agency implementation of the Information Act and the cost would dwarf any advantages over the present informal agency system.⁶⁷³

The final issue centers on the desirability of a submitter's appeal to the agency head. The Information Act provides for an agency appellate procedure for the requester, but ignores the submitter. Agency regulations generally implement the requester's appeal procedures, similarly ignoring the submitter. This places the submitter in a difficult position. First, the release authority is widely dispersed, so that field units making disclosure decisions possess widely varied experience with the Act and also varying philosophies on how much protection exempt material is due. Second, a submitter cannot ignore the cost-benefit analysis when advised that an agency is about to release its data. Even though a submitter deems material to be sensitive the cost of protective litigation versus the value of the data must be weighed. The right to appeal would be appropriate for submitters who have just as much or perhaps more interest in the subject matter in question than requesters. Currently, once an agency has decided to release, the submitter has no recourse other than seeking judicial review of the agency decision. It might be a better use of resources to employ the appeal channels already established for requesters than to force submitters, and therefore agencies, into court. If a submitter appealed, then sought review of an adverse decision, the record available for APA review would also stand a better chance

of being suitable. Submitter appeals could be achieved through amendment of the Information Act. In the absence of congressional action, acquisition-oriented agencies should consider adding submitter appeals to their freedom of information regulations, if only for a test period during which the concept may be evaluated.⁶⁷⁴

Timeliness and the Exhaustion of Administrative Remedies

There is tension between compliance with stringent Information Act time standards and execution of an agency's traditional mission. The time standards generally reorder to a degree an agency's established set of priorities in the face of the volume of requests and in the absence of budgetary increases fully funding freedom of information activities. Congress was determined to put teeth into the Information Act. Many agencies were taking months to respond to requests.⁶⁷⁵ Thus, the 1974 Amendments⁶⁷⁶ established unprecedented time standards. President Ford originally vetoed what became the 1974 Amendments. He viewed the time standards as onerous.

Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make . . . a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.

Therefore, I propose that more flexible criteria govern the responses to requests for particularly lengthy investigatory records to mitigate the burden which these amendments would otherwise impose, in order not to dilute the primary responsibilities of the law enforcement activities.⁶⁷⁷

President Ford was prophetic as the Open America⁶⁷⁸ case, which will be discussed below, illustrates. However, Congress was unimpressed with such dire sentiments, and overrode the veto. Senator Kennedy responded to the President's criticism:

(T)here is the issue of time limits. Our bill provides an agency 10 working days to respond initially to a request for information, 20 working days on appeal, and an additional 10 working days when unusual circumstances are present. That gives the agency 40 working days, or almost two calendar months--more than enough time for any agency to complete the process of finding and reviewing requested documents.

If a person sues the agency after that time, and the agency is still diligently trying to complete review of the materials under exceptional circumstances, then we have another escape valve in the bill--added by specific request of the administration during our conference. The agency may ask for, and the court is authorized to grant, additional time pending completion of such review.⁶⁷⁹

These remarks provide a summary of the time provisions which govern requests today, and ultimately provided the answer in the Open America case.⁶⁸⁰

In the hypothetical example described in an earlier part of this chapter,⁶⁸¹ the Rome Air Development Center had ten workdays after receipt to respond to the request.⁶⁸² The first day is counted when the FOI Manager receives the request.⁶⁸³ If ten or more workdays have elapsed between the postmark on the request and the date received, it is Air Force practice to forward an acknowledgment of receipt to the requester.⁶⁸⁴ When RADC forwarded the request to the MAJCOM (Air Force Systems Command) it was consulting with another "component of the agency having substantial subject-matter interest therein," in the language of the Act, thereby adding as many as ten additional workdays to the prescribed time limits.⁶⁸⁵ When the request was appealed to the Administrative Assistant of the Air Force, twenty workdays after receipt were allowed for the process.⁶⁸⁶ The first day is counted on the day the appeal is received in the Office of the Secretary of the Air Force.⁶⁸⁷ The time limits are stated in terms of workdays, which means that Saturday, Sunday and legal holidays are not counted. These statutory time limits mean that a request cannot be shunted to the bottom of the paperwork file, but must be assigned priority. The FOI Manager at each headquarters level monitors the time standards.

Either the initial ten-workday period or the twenty-day appellate procedure may be lengthened by a ten workday extension in the event of unusual circumstances. "Unusual circumstances" are defined in the 1974 Amendments as a need for additional time to search for and collect records from other locations,

a need for additional time to search for and collect and examine a voluminous amount of material to satisfy a single request, and a need for additional time to consult with another agency or another component of the same agency interested in the particular disclosure decision.⁶⁸⁸ As noted above, it is this last circumstance which is drawn upon to authorize the additional ten-day period to be used, if necessary, to facilitate forwarding recommendations for denials from field units to MAJCOMs (the initial denial authority) in the Air Force. An authoritative report by the House Committee on Government Operations indicates that the extension of time limits "can be invoked only once, during the initial decision process or the appeal but not both."⁶⁸⁹ The Committee probably means that the full ten-day extension may be used only once. The language of the Act permits multiple extensions so long as the ten-workday constraint is observed. This is the view espoused in the Attorney General's Preliminary Guidance⁶⁹⁰ and held by agencies generally.⁶⁹¹

If an agency fails to comply with the time limits, a requester will be deemed to have exhausted administrative remedies and may proceed to judicial remedies. The 1974 Amendments indicate that initial agency decisions will notify requesters "of the right . . . to appeal to the head of the agency any adverse determination"⁶⁹² The Attorney General's Preliminary Guidance suggested that the 1974 Amendments did not expressly forbid an initial determination that is administratively final, at the same time recognizing that agencies will probably retain a two-step (initial determination/appellate) procedure.⁶⁹³ However, the language of the Amendment provides that if the initial determination is made at a level beneath the agency head, then the agency must notify the requester of the right to appeal to the agency head (or designee). In practice, agencies do not deem administrative remedies to have been exhausted until the requester has taken advantage of the agency appeal procedure.⁶⁹⁴ However, if an agency fails to respond with an initial

determination in timely fashion, that is, to make the determination within ten workdays, and then "immediately notify" the requester, the requester need not employ the appellate procedure and may pursue the judicial remedy. Agencies unable to respond within the initial time limits should explain the difficulty to the requester, provide the contemplated date of response, and inform the requester of the present right to appeal.⁶⁹⁵ In this way the agency appellate procedures are normally preserved. Most requesters, at least in acquisition circles, will respond favorably to an indication of difficulties encountered by an agency and will negotiate an acceptable date for the substantive response. Agency regulations typically provide that a requester must file an appeal so that it reaches the appellate authority within a certain number of days after notification that a request has been denied. For example, the Department of Defense requires that appeals be filed within forty-five workdays of notice of an initial denial.⁶⁹⁶ There are sound reasons for the doctrine of exhaustion of administrative remedies. One federal court summarizes them:

(1) (J)udicial review may be hindered by failure of the litigant to allow the agency to make a factual record or exercise its discretion; (2) courts may never have to intervene if the complainant party is required to pursue his administrative remedies; (3) the agency should be given the opportunity to correct its own errors; (4) ignoring administrative processes could weaken the effectiveness of the agency by encouraging people to ignore its procedures; (5) the agency possesses expertise in dealing with complicated and technical facts in certain areas of the law; and (6) resolution of the dispute may involve interpretation and application of agency regulations.⁶⁹⁷

After a requester has exhausted administrative remedies and brought suit seeking disclosure, if the government can show the existence of "exceptional circumstances" and that the agency is exercising "due diligence" in attempting to respond to the request, then the federal district court may retain jurisdiction and allow the agency additional time to respond to the request.⁶⁹⁸ This provision of the Act was examined in a 1976 District of

Columbia Circuit Court of Appeals case, Open America v. Watergate Special Prosecution Force.⁶⁹⁹ The case began with a request to the Attorney General of the United States and the Director of the FBI demanding the production for inspection of all records relating to the role of a former Acting Director of the FBI in any aspect of Watergate.⁷⁰⁰ The Director of the FBI informed the requesters that on the day their letter had been received, 5,137 other requests were on hand and being processed. Requesters appealed. The FBI response essentially asked the requesters to take a number. Requesters filed suit. The federal district court judge ordered the FBI to provide requesters with a Vaughn v. Rosen index within thirty days. In effect, the requesters demanded, and the judge granted, processing priority. Under this ruling, any of the 5,137 requesters who wished priority need only file suit; the remainder will wait their turn. If all 5,137 requesters decided they wished priority and filed suit, presumably the dates of motions for a Vaughn index would control, and the phrase "race to the courthouse" would take on new meaning.

The circuit court found both "exceptional circumstances" and "due diligence" on the part of the FBI sufficient to permit the district court to retain jurisdiction and allow the FBI to respond to the request in turn. The circuit court noted that the House Committee on Government Operations had estimated the total additional cost of the 1974 Amendments for all agencies at \$50,000 in 1974 and \$100,000 for each of the next five years.

The cloudy state of the Congressional crystal ball is demonstrated by an FBI official's affidavit filed in these proceedings: "(The FBI's) actual cost for implementation of the FOIA was \$160,000. In Fiscal year 1975 it jumped to \$462,000 and for Fiscal year 1976 we have estimated the cost to be \$2,675,000. For Fiscal year 1977, we have estimated the cost for the FOIA to be the same \$2,675,000 plus an additional \$725,000 for the Privacy Act of 1974."

If Congress' anticipation of the burden thrust upon all agencies by its 1974 FOIA amendments is to be taken as a measuring stick, then surely the demands placed on this one agency by Congress' action may reasonably be viewed as "exceptional circumstances."⁷⁰¹

In 1976 the FBI had assigned 191 employees at its Headquarters alone to process

requests. The Open America request would involve a project team headed by a supervisory special agent, and including five research analysts and two or more research clerks reviewing over 38,000 pages.⁷⁰² The court thought the FBI was probably doing the best it could under the circumstances.

In summary, we interpret Section 552(a)(6)(C) to mean "exceptional circumstances exist" when an agency, like the FBI here, is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests. In such situation, in the language of subsection (6)(C), "the court may retain jurisdiction and allow the agency additional time to complete its review of the records." Under the circumstances defined above the time limits prescribed by Congress in subsection (6)(A) become not mandatory but directory. The good faith effort and due diligence of the agency to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible by assigning all requests on a first-in, first-out basis, except those where exceptional need or urgency is shown, is compliance with the Act.⁷⁰³

The result in Open America should be viewed with caution. The FBI was unprepared to handle a surge of requests in 1976. In the years to come budget requests and personnel allocations should reflect the realities of the freedom of information era. The FBI may have a more difficult burden of proof today in meeting the tests of "exceptional circumstances" and "due diligence." Other courts have remained unpersuaded of the difficulties confronting the government. In a court order issued the year before Open America, the Department of Justice was given three months to comply with a request from a son of Julius and Ethel Rosenberg seeking documents relating to their trial and execution. To comply with the order, the Justice Department had to assign 65 full-time and 21 part-time employees exclusively to this single request.⁷⁰⁴ Most requesters recognize the burden placed on agencies by the large number of requests and the difficulty of reviewing records to distinguish releasable from non-releasable material, and are willing to permit an agency a reasonable amount of time for processing before seeking the judicial remedy.⁷⁰⁵ Since the time limits are for the benefit of requesters, requesters may waive them or negotiate realistic

time limits.

Generally, agency compliance with time standards has varied from agency to agency and even from office to office within a single agency. The General Accounting Office surveyed eleven agencies at forty-eight locations over the period January 1, 1976 through September 1, 1977.⁷⁰⁶ The average processing time ranged from 123 days at the United States Attorney's Office in New York City to four days at the Air Force Logistics Command at Wright-Patterson Air Force Base, Ohio. No requests at the U.S. Attorney's Office were processed within ten days. The Dallas Regional Office of the Department of Energy processed only twenty percent of the surveyed requests within ten days and averaged 118 days apiece on the requests. The Department of Defense organizations surveyed, which were units which could be expected to have a larger share of requests for acquisition records, generally appeared to be complying with the time standards.⁷⁰⁷

	<u>Percent Of Responses Within 10 days</u>	<u>Average Processing Time (in days)</u>
Air Force Logistics Command, Wright-Patterson AFB, Dayton, Ohio	100	4
Air Logistics Center, Hill AFB, Ogden, Utah	99	-
Army Aviation Systems Command St. Louis, Missouri	96	6
U.S. Army Corps of Engineers District Office, Los Angeles, California	89	7
District Office, Kansas City, Missouri	100	4
U.S. Naval Air Station, San Diego, California	81	14
U.S. European military commands	83	8

Those agencies which had difficulty in making timely responses blamed postal

delays in forwarding case files for consultation with other agency components, difficulty in collecting records from several locations for a single request, and most important, an insufficient number of qualified personnel to examine the voluminous records requested.⁷⁰⁸

It is not known whether those agencies which are able to meet the stringent time standards of the 1974 Amendments are able to do so because they have established a more efficient processing mechanism, or because they have secured additional funding for additional employees to process requests, or because priorities have been reorganized so that processing Information Act requests subordinates other work. The answer may be some combination of these factors. The extent to which traditional work of an agency has been subordinated is an Information Act cost which will not appear in the annual reports to Congress.

The Judicial Remedy

If the agency head denies an Information Act request, the stage is set for the judicial remedy. The final agency denial should explain the reasons for the denial and inform the requester of the right to file a complaint in federal district court.⁷⁰⁹ The Information Act is manifestly a disclosure-oriented statute. The Act provides for lawsuits by requesters, but not by submitters. The 1974 Amendments added teeth to the philosophy of disclosure. Since 1974 more requests have been made and more information has been disclosed, in a shorter time, than ever before. This state of affairs gave birth to the reverse-FOIA lawsuit. Before 1974 government agencies could generally be depended upon to protect the data of third parties. After 1974 submitters began seeking the courts for help in protecting material which agencies were quite willing to release. The procedural aspects of lawsuits filed by both requesters and submitters will be outlined below. Where possible, direct-FOIA

and reverse-FOIA lawsuits will be contrasted.

Jurisdiction

Section 552(a)(4)(B) of the Information Act itself explicitly provides the jurisdictional basis for lawsuits by requesters against custodian agencies. A federal district court "has the jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."⁷¹⁰

The submitter does not find a jurisdictional basis in the Information Act to support efforts to enjoin disclosure. Until 1977 submitters would assert jurisdiction through either the Administrative Procedure Act⁷¹¹ or the federal question jurisdiction statute,⁷¹² or both,⁷¹³ depending on the circuit in which the submitter was bringing suit. The split in the circuits was resolved in 1977 by Califano v. Sanders, a case not involving the Information Act. The Supreme Court held that APA does not confer subject matter jurisdiction.⁷¹⁴ In 1976 the federal question statute had been amended so that the \$10,000 jurisdiction amount was no longer required in actions against federal agencies. The amended language provides that

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.⁷¹⁵

The Supreme Court observed that

The obvious effect of this modification, subject only to preclusion of review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate. We conclude that this amendment now largely undercuts the rationale for interpreting the APA as an independent jurisdictional provision.

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We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.⁷¹⁶

Reverse-FOIA cases subsequent to Califano v. Sanders have found jurisdiction in 28 U.S.C. § 1331(a).⁷¹⁷ If there was any lingering doubt on the matter it was resolved by the Supreme Court's footnoted observation in Chrysler v. Brown, citing Califano v. Sanders and concluding that "jurisdiction to review agency action under the APA is found in 28 U.S.C. § 1331."⁷¹⁸

Venue

The Information Act provides that venue will lie in "the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia. . . ."⁷¹⁹ The 1974 Amendments added the District of Columbia as a proper venue ostensibly to provide requesters with a forum which has considerable experience with Information Act cases and to provide a convenient forum for both public interest group requesters and government agencies.⁷²⁰

Submitters must look to the general venue statute to find a proper forum. Thus, 28 U.S.C. § 1391(b) provides that a civil action not founded solely on diversity of citizenship "may be brought only in the judicial district in which all defendants reside, or in which the claim arose, except as otherwise provided by law."⁷²¹ Furthermore, 28 U.S.C. § 1391(e) provides that a civil action in which an officer or agency of the United States is a defendant may be brought in any judicial district in which "(1) a defendant in the action resides, or (2) the cause of action arose, . . . or (4) in which the plaintiff resides if no real property is involved in the action."⁷²²

If agencies will provide notice of impending disclosure to submitters, submitters may be able to select the initial forum to litigate the propriety of disclosure. The classic Information Act venue case involved GTE Sylvania, Inc. and eleven⁷²³ other television manufacturers as submitters, the Consumer

Product Safety Commission as the custodian agency, and both Consumers Union of the United States, Inc. and Public Citizens Health Research Group as requesters. In 1972 the Consumer Product Safety Act created the Consumer Product Safety Commission as an independent regulatory agency.⁷²⁴ Two years later the Commission decided to investigate television set safety. Toward this end, the Commission attempted initially to elicit television accident data voluntarily. Manufacturers proved reluctant to submit the desired details. The Commission then issued subpoenas duces tecum pursuant to the Consumers Product Safety Act.⁷²⁵ Some 120,000 pieces of paper were submitted in response to the subpoenas. After the information was massaged into more manageable form, the requesters invoked the Information Act. In March 1975 the Commission informed submitters and requesters alike that the data was not exempt and even if it was exempt from mandatory disclosure the Commission intended to exercise its discretion to disclose on May 1, 1975.⁷²⁶

GTE Sylvania, RCA Magnavox, Zenith, Motorola, Warwick Electronics, and Aeronautical Ford filed individual lawsuits in the federal District Court of Delaware. Matsushita Electronic, Sharp Electronic, and Toshiba-America filed actions in the Southern District of New York. General Electric filed in the Northern District of New York. Admiral Corporation filed in the Western District of Pennsylvania.⁷²⁷ These individual actions were consolidated in the federal District Court of Delaware, temporary restraining orders were issued, and then on October 25, 1975, a preliminary injunction was issued forbidding release of the requested data pending trial.⁷²⁸ The submitters had chosen their forum, and the requesters proceeded to select theirs, the federal District Court for the District of Columbia. This direct-FOIA suit was filed May 5, 1975. Defendants included the Consumer Product Safety Commission and the television manufacturers. Requesters had not attempted to intervene in Delaware, nor did the submitters attempt to join requesters in that action.

The District of Columbia District Court dismissed the complaint;⁷²⁹ the District of Columbia Court of Appeals reversed.⁷³⁰ and the submitters filed a petition for a writ of certiorari to the Supreme Court. Meanwhile, back at the Delaware Court, lawyers for the submitters had been busy. The Delaware court granted a motion for summary judgment and permanently enjoined the CPSC from releasing the television accident data on December 8, 1977.⁷³¹ In response to this activity in Delaware, the United States Supreme Court granted certiorari to the District of Columbia case, vacated the lower court opinion, and remanded so the impact of the permanent injunction handed down by the Delaware District Court could be considered.⁷³²

If submitters had chosen their forum well, requesters had chosen their circuit well. On remand, the District of Columbia Circuit Court of Appeals was not prepared to defer to the Delaware District Court merely because a permanent injunction had issued any more than it had been prepared to yield to a preliminary injunction from Delaware. The court examined and rejected various theories which might preclude litigation in one court subsequent to issuance of a permanent injunction in another:

(1) Stare decisis--"The notion that any would defer on stare decisis grounds to a decision by a co-ordinate court with which he disagreed is unworthy of comment."⁷³³

(2) Collateral estoppel--"If the FOIA applicant has neither been a party nor otherwise represented in a prior successful reverse-FOIA suit, he will not be blocked from taking his controversy to the courts."⁷³⁴

(3) Comity--"(T)he doctrine surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent."⁷³⁵

Thus the D.C. Circuit Court of Appeals concluded that prior litigation between submitters and the agency need not have a dispositive effect on subsequent litigation initiated by requesters. The court's suggested remedy for conflicting decisions is to employ various procedural devices presently available. These devices (intervention, joinder, and consolidation) will be discussed in

the next three sections. The D.C. Circuit Court remanded the case to the district court for a decision on the merits.

Its (the District Court's) first task is to analyze closely the Delaware court's reasoning, for it may turn out that the court here will agree with the Delaware court. Should, however, the court decide that the failure to release the information was indeed improper, it will have to ascertain the relief appropriate in the circumstances. Since the manufacturers are party-defendants, it might consider enjoining them from enforcing their Delaware judgment against the Commission.⁷³⁶

The District of Columbia Circuit raises an interesting scenario: the Delaware District Court issues a permanent injunction, the D.C. District Court enjoins submitters from enforcing that Delaware judgment, and the CPSC then releases the requested documents in the face of the Delaware injunction. The D.C. Circuit Court of Appeals is apparently suggesting that a federal agency may ignore a federal district court injunction. Presumably, if the CPSC disclosed the material, a submitter could seek a contempt citation in Delaware; if the CPSC were successfully held in contempt, then presumably the D.C. District Court would hold the submitter in contempt of its judgment which forbade the submitter from seeking a contempt citation in Delaware. Hopefully, such an empassé will never occur either in freedom of information or any other area of the law. Certiorari was granted once again in the D.C. Circuit Court case and Mr. Justice Marshall observed, for a unanimous Supreme Court, that "(t)here is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents."⁷³⁷ The Supreme Court did not discuss stare decisis, or collateral estoppel, or comity, as had the D.C. Circuit Court of Appeals; instead, the Supreme Court re-read 5 U.S.C. § 552(a)(4)(B):

The Freedom of Information Act gives federal district courts the jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." This section requires a showing of three components: the agency must have (1) improperly (2) withheld (3) agency records. In this case the sole

question is whether the first requirement, that the information has been "improperly" withheld, has been satisfied."⁷³⁸

The Supreme Court concluded that the Commission had not "improperly" withheld anything. The Commission had been subject either to a temporary restraining order or a preliminary injunction or a permanent injunction forbidding disclosure since the complaint was first filed by requesters in the District of Columbia District Court. The agency had not tried to avoid disclosure; the agency had had its discretion to disclose removed. It was clear that the Delaware District Court had jurisdiction to issue the injunctions; those subject to an injunction are normally expected to obey it until it is dissolved, even if they have proper grounds to object.⁷³⁹ Thus, the Supreme Court concluded that the Commission was required to obey the injunctions out of respect for the judicial process and that the withholding was clearly not "improper." The D.C. Circuit Court opinion was reversed.

The Commission may have wished by this time that it had never become interested in television set safety. The answer to the substantive disclosure question came three months later. The summary judgment for submitters and permanent injunction forbidding disclosure of the television accident reports⁷⁴⁰ were affirmed on appeal by the Third Circuit Court⁷⁴¹ and by the Supreme Court.⁷⁴² Section 6(b)(1) of the Consumer Product Safety Act was found to be an exemption three statute which effectively prohibited disclosure of this particular accident data.⁷⁴³ The Consumers Union case focuses attention on the submitter's early selection of a convenient forum, which proved advantageous, and on the procedural devices which are available to submitters, agencies, and requesters to promote efficient use of the court system.

Intervention

Requester and submitter lawsuits need not proceed independently of each other. Traditional procedural devices such as intervention, joinder, and

consolidation may effect a more efficient use of the judicial system; however, it also may be tactically advantageous for a submitter or requester to avoid or resist such mechanisms. Federal Rule of Civil Procedure 24(a) provides for a right to intervene

(2)(W)hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.⁷⁴⁴

Both requesters and submitters may be able to meet the test to intervene as of right, or failing this, the test for permissive intervention. Focusing on intervention of right, a requester would seem to have an interest in the subject matter of a submitter's suit against an agency, and the Consumers Union⁷⁴⁵ case, dealt with at length in the prior section, demonstrates that the outcome may indeed "impair or impede his ability to protect that interest" in disclosure. Requesters did not attempt to intervene in the Delaware District Court where submitters ultimately won summary judgment and a permanent injunction forbidding disclosure by the Consumer Product Safety Commission. Subsequent efforts by the requesters in the District of Columbia District Court were dismissed since the Commission was not improperly withholding records, but was merely complying with the Delaware injunction. The answer on the disclosure issue was thus found by an appeal of the Delaware judgment to the Third Circuit and a writ of certiorari to the Supreme Court. Requesters may have wished they had intervened in the Delaware action, though at the time the tactical decision to pursue a remedy in the District of Columbia court system no doubt appeared preferable.

Similarly, a submitter would seem to have an interest in the subject matter of a direct-FOIA suit brought by a requester against the custodian agency, and an adverse ruling enjoining the withholding will indeed "impair or impede his ability to protect that interest" in nondisclosure. Thus, the

crucial issue in both the requester and submitter motions to intervene would seem to be whether "the applicant's interest is adequately represented by existing parties." If the agency has opted for disclosure, will the agency adequately represent the requester's interests against the submitter? If the agency has opted for nondisclosure, will the agency adequately represent the submitter's interests against the requester? The demonstration of inadequate representation may be found in a parting of interests. For example, in a direct-FOIA lawsuit, the agency may believe a request should be partially filled while the submitter believes it should be completely denied; in a reverse-FOIA lawsuit, the agency may believe a request should be partially denied, while the requester believes it should be completely filled. However, if there is unity of interests between the agency and the potential intervenor, "inadequate representation" may be more difficult to show. Nevertheless, the submitter might argue that the government cannot truly make out a "substantial competitive harm" case under exemption four, that the business firm submitter can thereby requiring intervention; that the submitter's interest is always different from the agency's since the agency has discretion to disclose even material exempt from mandatory disclosure; and that the agency must also consider the "public interest" which may or may not coincide with the submitter's interests. The requester might argue that its private interest in disclosure diverges from the agency's interest which is broadly against government secrecy and which is unconcerned with the reason for the request and thus is incapable of negotiating a compromise which could be acceptable to the requester. The requester might also employ the latter two arguments cited above for the submitter. The District of Columbia Circuit Court of Appeals in Consumers Union⁷⁴⁶ suggested that "there are procedural devices aplenty" to avoid multiple suits and multiple judgments, citing Fisher v. Renegotiation Board as a case where a submitter was permitted to intervene as of right in a

direct-FOIA suit.⁷⁴⁷

Joinder

The District of Columbia Circuit Court of Appeals also suggested joinder as a procedural remedy for multiple lawsuits:

At the very least, the Commission (the custodian agency) could have urged that the requesters were parties whose joinder was required under Civil Rule 19.

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If, as the manufacturers (submitters) and the Commission assert, the Delaware reverse-FOIA suit so affected appellants' (requesters) interest in disclosure of the information sought that they are now barred from litigating it in the District Court here, the Delaware action certainly could have been said, in the words of Rule 19, "as a practical matter (to) impede (their) ability to protect that interest or . . . (to) leave (the agency) subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of (appellants') claimed interest."⁷⁴⁸

The D.C. Circuit Court was apparently thinking of the agency being confronted with conflicting judgments from different federal district courts as a rationale for joinder, which meets one of the tests of Rule 19(a). Federal Rule of Civil Procedure 19(a) also provides another test for joinder which is of interest:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest⁷⁴⁹

An injunction in favor of the submitter (to withhold) or the requester (to disclose) would serve to impair or impede protecting the respective interest, as a practical matter.

If Rule 19(a) is applicable, the party in question shall be joined. In contrast, Rule 20 provides for permissive joinder:

All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.⁷⁵⁰

The requester may join a submitter and vice versa when the same FOIA request is at issue and the question of law and fact will be the same for the agency and the joined party.

However, joinder may constrain the choice of forum. As noted in the previous section, in cases against the government, the venue provisions are found at 28 U.S.C. § 1391(e).⁷⁵¹ When either the requester or the submitter is joined as a defendant in reverse-FOIA cases, the applicable venue provisions are found at 28 U.S.C. § 1391(b).⁷⁵² Both provisions must be satisfied for proper venue to be achieved for all defendants.⁷⁵³ There are equally difficult jurisdictional questions arising from joinder. Mere satisfaction of the tests for joinder found in Rule 19 or Rule 20⁷⁵⁴ does not automatically provide jurisdiction over the joined party. Previously, it was noted that section 552(a)(4)(B) of the Information Act⁷⁵⁵ provides a jurisdictional basis for direct-FOIA suits and the federal question statute⁷⁵⁶ provides a jurisdictional basis for reverse-FOIA suits. When private parties are defendants the jurisdictional statute requires that the amount in controversy exceed \$10,000.⁷⁵⁷ If the amount in controversy can be met the court has jurisdiction to adjudicate the matter with all parties joined; if the amount in controversy is not met, pendant party jurisdiction will have to be argued. When the jurisdiction of federal courts is properly invoked to hear federal claims, the courts also have the power to hear claims over which they would normally have no jurisdiction, so long as the initial claim and the pendant claim involve a "common nucleus of operative fact" and so long as adjudicating both the claims in the same lawsuit would further the ends of judicial economy, efficiency, and fairness and convenience to the litigants.⁷⁵⁸ While this classic 1966 test for pendant party jurisdiction may be met in either the direct or reverse-FOIA suit, more recent pendant party jurisdiction cases have added the requirement that the statute providing a jurisdictional basis for the initial federal claim not be

explicitly or implicitly negated through the exercise of such jurisdiction.⁷⁵⁹ One noted commentator has suggested that pendant jurisdiction may survive the additional test in direct-FOIA suits but not in reverse-FOIA suits:

In direct FOIA cases the purpose of the FOIA would seem to be served by the exercise of jurisdiction over the submitter. Thus, although the FOIA is limited in scope to claims by the requester against the agency, Congress did not intend to preclude the litigation of claims against nonfederal defendants in FOIA cases Congress in the FOIA simply never contemplated the joinder of nonfederal defendants.

Whether the submitter should be permitted to join the requester in a reverse FOIA suit is more problematic. Here the basis for jurisdiction against the agency is not the FOIA, but 28 U.S.C. § 1331, which requires that the amount in controversy exceed \$10,000 when private parties are defendants. The question is whether a party should be allowed to invoke ancillary jurisdiction to circumvent this express congressional limitation.

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In sum, although not conclusive, . . . the assertion of pendant party jurisdiction may be more difficult in reverse FOIA cases than in direct FOIA cases.⁷⁶⁰

Consolidation

The District of Columbia Circuit Court of Appeals in its Consumers Union opinion also cited "transfer and consolidation of FOIA and reverse-FOIA suits" as a procedural device which may be used to avoid conflicting opinions from different courts.⁷⁶¹ Federal Rule of Civil Procedure 42(a) provides that

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays.⁷⁶²

The test of "a common question of law or fact" is easily met; direct- and reverse-FOIA cases are excellent candidates for consolidation. The problem lurks in the necessity for the cases to be "pending before the court." Direct- and reverse-FOIA actions are often filed in different forums. Thus, the different actions must be transferred to the same forum before consolidation is a viable procedural mechanism. This is precisely what the submitters in the GTE Sylvania⁷⁶³ case did. Seven submitters of television safety d

had filed a reverse-FOIA suit in the Delaware District Court, three had filed in the Southern District of New York, one in the Northern District of New York, and one in the Western District of Pennsylvania. All of these suits were transferred to the Delaware District Court and consolidated. However, the requester's direct suit filed in the D.C. District Court was never transferred to Delaware (nor vice versa) so consolidation provided only a partial procedural remedy for multiple suits and multiple judgments. The true remedy becomes the motion for change of venue.

The federal venue statute, 28 U.S.C. § 1404(a), provides that "(f)or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."⁷⁶⁴ However, it is unlikely that a court will transfer a case of its own volition. One or more parties will normally request the change of venue. Thus, in the GTE Sylvania case the agency might have requested transfer of the reverse-FOIA action to the forum where the direct suit was being tried. The submitters, who had selected the Delaware court as their preferred forum, would no doubt have resisted, and the Delaware court may have noted that its jurisdiction had been invoked first and that the case was farther along in Delaware than the case in the other forum and denied the motion. The direct-FOIA forum may refuse to transfer to the reverse-FOIA forum, perhaps citing convenience to the parties and the venue advantages in favor of the requester which are built into the Information Act. Thus, the tactical rationale which caused certain forums to be selected in the first place and which caused no intervenor motions to be filed, may cause the submitter and the requester to resist transfer to another forum. To the extent the submitter and the requester are able to enlist their chosen forum in preserving the status quo, consolidation will prove an empty remedy, for want of transfer.

In addition to jurisdictional and venue requirements, and the procedural devices of intervention, joinder, and consolidation, there are two other procedural concepts warranting discussion--indispensable parties and collateral estoppel. Neither has yet proved dispositive in FOIA cases, but they have been argued, and may surface again in litigation.

Indispensable Parties

The indispensable party issue is a corollary to the joinder of parties issue. The analysis under Federal Rule of Civil Procedure 19 requires that it be first determined whether a party shall be joined because

(2) (H)e claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.⁷⁶⁵

If this test is met the court shall order joinder. The concept of indispensable parties arises if a party must be joined, but cannot be, and the court determines that the action shall not proceed without the absent party but shall instead be dismissed. Perhaps a submitter or requester is not subject to service of process, or perhaps joinder would deprive the court of subject matter jurisdiction, or joinder would render venue improper. The court will evaluate several factors to determine whether to dismiss the action or to proceed if the party cannot be joined:

(F)irst, to what extent a judgment rendered in the person's absence might be prejudicial to him or to those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.⁷⁶⁶

This District of Columbia Court of Appeals, in the Consumers Union case discussed earlier, noted in dictum that a prior suit filed in the Delaware District Court by submitters should probably (arguably) have been dismissed due

to the absence of indispensable parties, the requesters.⁷⁶⁷ Similarly, one commentator perceives submitters to be indispensable parties in direct-FOIA suits.

The courts almost uniformly agree that a holder of a trade secret, patent, or copyright is an indispensable party in a suit between other parties regarding infringement of the patent, trade secret, or copyright. Similarly, the submitter of business data would also be an indispensable party to a proceeding to determine whether that data should be made public. The submitter clearly possesses an interest "relating to the subject of the action" and disposition of the case in his absence could impair or destroy that interest.⁷⁶⁸

Declaring submitters to be indispensable parties would represent a considerable graduation in status for submitters, since the Information Act provided a judicial remedy for the requester, ignoring completely the submitter. Courts have not yet dismissed a FOIA suit for want of an indispensable party, whether submitter or requester. Courts may be wondering whether any plaintiff will have an adequate remedy if either a direct- or reverse-FOIA suit is dismissed for nonjoinder of the other party. The indispensable party concept, if implemented, could theoretically produce a "grid lock" on initial and subsequent, direct- and reverse-FOIA suits and agency decisions would control.

Collateral Estoppel

The doctrine of collateral estoppel, like that of indispensable parties, has not yet had a significant impact on FOIA suits. However, FOIA litigators are aware of its potential. Generally, the doctrine of collateral estoppel binds parties to a previous suit to those conclusions on material issues which are revealed in the prior judgments.⁷⁶⁹ Identity of issues and of parties in the prior suit is necessary to preclude re-litigation of the issue by the parties in a subsequent suit. Collateral estoppel was argued in the 1975 district court case of Robertson v. Department of Defense.⁷⁷⁰ Robertson was the requester, General Motors was the submitter, and DOD was the custodian agency. When the agency decided to release some of the requested material,

the submitter filed a reverse-FOIA suit in the District Court for the Eastern District of Virginia.⁷⁷¹ After a temporary restraining order was obtained in the Virginia court, the requester filed suit in the District of Columbia District Court, joining the submitter.⁷⁷² A preliminary and then a permanent injunction was obtained in the Virginia District Court. The submitter argued in the subsequent direct-FOIA suit that the same issues should not be re-litigated. The only problem was the requester had not been a party to the action in Virginia. The submitter ingeniously argued that the agency had acted as the submitter's representative, and thus the issues should not be re-litigated by the requester in a subsequent suit. However, the court did not find that the requester was collaterally estopped since the requester desired full disclosure while the agency defended only partial disclosure.⁷⁷³ Thus, there was no identity of interests. The unanswered question is what the district court would have decided had the disclosure positions of the requester and the agency been identical. If agency and requester positions on the issues are identical, may those issues be re-litigated?

This question was answered for the District of Columbia Circuit three years later in the Consumers Union case: "An agency's interests in FOIA suits of either stripe diverge markedly from private interests, and raise serious doubt whether the agency could ever be deemed to represent members of the public."⁷⁷⁴ It probably cannot be assumed that the agency's position will always be synonymous with either submitter or requester. A submitter who desires protection for all data perceived to be sensitive may be paired with an agency which may be withholding, but grudgingly, and inclined to disclose just as much information as possible. A requester who desires full disclosure may be paired with an agency which may disclose but is affected by the desire to protect its deliberative processes to the extent possible. Practically, the agency can never really represent the interests of submitter or requester, even

if the agency appears, initially, to be willing to disclose/withhold the same amount of data for the same reasons as the requester/submitter. The D.C. Circuit Court of Appeals, thinking of the Consumers Union, a requester, observed that

(T)o accept a governmental agency as an adequate representative of requesting parties whenever the agency nominally favors disclosure is to ignore the stark fact that their interests are not congruent: The agency is concerned with conserving the time and energy of its personnel, and with avoiding establishment of a precedent that in the future might support mandatory divulgence of information it would prefer to keep confidential; the requesters simply want the information.⁷⁷⁵

A quick reading of the Information Act might suggest that trial procedure has been simplified by explicit provision for jurisdiction and venue. However, the interests of the third party, the submitter, raises the level of complexity. Intervention, joinder, consolidation, indispensable parties, collateral estoppel--all are mechanisms and doctrines which must be evaluated by the FOIA trial attorney. Currently, if submitters have the resources and the inclination to resist disclosure of certain sensitive data, and if the agency will provide notice of impending disclosure, the submitter has an advantage in being able to choose the initial forum. The requester may not wish to intervene in the submitter's forum. Yet the custodian agency must honor temporary restraining orders and preliminary and permanent injunctions issued by the submitter's forum. Since this state of affairs may negate the venue advantages provided the requester in the Information Act, suggestions abound to redress the imbalance in favor of requesters. The D.C. Circuit Court's suggestion, which was reversed by the Supreme Court, was to permit the requester to file a subsequent direct-FOIA suit in a convenient forum, and if the prior judgment of the submitter's forum to withhold is deemed improper, the requester's forum "will have to ascertain the relief appropriate in the circumstances. Since the (submitters) are party-defendants, it might consider enjoining them from enforcing (their prior judgment against the agency)."⁷⁷⁶ Suggestions from

other quarters involve joinder or intervention by the requester, with a right in the requester to transfer to the requester's choice of forum.⁷⁷⁷ The House Committee on Government Operations endorses some such amendment to subordinate the submitter's choice of forum to the requester's choice:

The committee recommends that FOIA be amended to provide rules governing the venue of reverse FOIA lawsuits. The purpose of an amendment should be to limit the amount of litigation arising out of a FOIA request by allowing the submitter, requester, and government to participate in the same lawsuit. Participation in the litigation should not be a requirement of maintaining a request for documents or a claim of confidentiality. The existing preference for the rights of requesters should be maintained.⁷⁷⁸

Of course when requesters file suit first, they are able to choose their forum, and may join submitters as defendants with the agency. In this case the benefits of litigation in one lawsuit are preserved, plus some practical benefits to the requester:

In some of these cases . . . we have started joining the corporations that have filed the documents as defendants pursuant to rule 19. Whether the defendants are in fact necessary or indispensable, we do not know, but our purposes are three. First, when corporations get dragged in and have to defend themselves, they sometimes end up giving up the documents because they do not want to spend the time and money litigating the question. But if they think they will get free representation by the Justice Department, they are perfectly willing to let the government fight to withhold it. Second, in a lot of these cases, they are going to come in anyway. If they are really worried about disclosure . . . they will come in themselves. It just slows down the litigation to have to wait for them to make a motion to intervene and to have the judge rule, and so forth. And the third reason is to get a little free discovery.⁷⁷⁹

Basis for Relief and Scope of Review

The Information Act itself explicitly provides the requester's basis for relief and for a federal district court to determine de novo if a government agency is improperly withholding requested material, as opposed to a mere judicial review of the agency determination.⁷⁸⁰ The controversy in this area has centered on the basis for a submitter's relief and the related issue of whether the scope of review is de novo as it is in direct-FOIA suits. Business submitters have generally argued that the Information Act itself or in the

alternative a statute such as the Trade Secrets Act⁷⁸¹ constitutes the basis of the cause of action in a reverse suit, while agencies and requesters have argued that the submitter's basis for relief is to be found in the Administrative Procedure Act.⁷⁸² The debate⁷⁸³ continued until April 1979, when the Supreme Court handed down its opinion in a reverse-FOIA suit, Chrysler Corporation v. Brown.⁷⁸⁴ It is now clear that the basis for reverse suits is the APA. Though less clear, it is probable that the scope of review is not de novo as in direct suits.

At stake in the Supreme Court case was equal opportunity data submitted by Chrysler Corporation, a DOD contractor, to the Defense Logistics Agency. In 1975 the DLA gave notice to Chrysler of the agency decision to disclose.⁷⁸⁵ Chrysler secured a temporary restraining order. The Delaware District Court conducted a trial de novo, subjected the agency disclosure decision to an APA review, found some of the requested material to fall within exemption four, decided the exemptions were permissive and not mandatory, and concluded that some of the requested material could not be disclosed due to agency regulations which effectively prohibited release.⁷⁸⁶ On appeal, the Third Circuit Court of Appeals agreed that the exemptions are permissive and that an APA review is in order, but found that the review should have been limited to the agency record rather than de novo, and concluded that agency regulations did not forbid disclosure.⁷⁸⁷ The Supreme Court agreed that the Information Act exemptions are permissive, in contrast with exemptions found in other statutes⁷⁸⁸ wherein Congress explicitly made the exemption from disclosure mandatory. Both the language of the Information Act, which is concerned exclusively with disclosure, and the Act's legislative history compelled the conclusion of permissive exemption. It was the concept of mandatory exemptions which was necessary to devine a basis for relief in the Information Act itself, for if exemptions were mandatory, then the disclosure of exempt information would be a violation of

the Act itself. Absent express amendment by Congress, the Supreme Court laid to rest the theory that a submitter's cause of action is found in the FOIA:

We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure.⁷⁸⁹

The Supreme Court turned next to the Trade Secrets Act and found it wanting as a basis for a private right of action. The Court noted that a private right of action is seldom implied from a criminal statute.⁷⁹⁰ The Court further noted that the legislative history of 18 U.S.C. § 1905 is devoid of any indication that Congress intended to create a private right of action, and more importantly, that there is an alternative avenue of redress--the APA.⁷⁹¹

The Supreme Court then turned to the Administrative Procedure Act, which provides that "(a) person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."⁷⁹² The act of disclosing business data is agency action, and the alleged competitive harm to business submitters is the claimed adverse impact. Chrysler Corporation, the government, the Delaware District Court, the Third Circuit Court of Appeals, and the Supreme Court all agreed that the agency decision may be reviewed under the APA. The debate centered on the scope of review, once the submitter's basis for relief had been identified.

The scope of review issue is characterized from the submitter's viewpoint by the Fourth Circuit Court of Appeals in Westinghouse Electric Corporation v. Schlesinger:

Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that right to protection from disclosure assured him under Exemption 4, in an equity action in which he can have a de novo trial? The envious competitor or the curious busybody demanding access to that private information has the

right to such a de novo trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him "not only as a matter of fairness but as a matter of right," seeks what may be regarded as correlative relief?⁷⁹³

The Fourth Circuit Court of Appeals felt that de novo review was in order to determine whether material fell into exemption four or the Trade Secrets Act.

It would be an incredible rule that a legislative prohibition such as § 1905, fixing limits on executive action for the benefit of the plaintiffs is to be construed and applied by the executive with only a right of review for arbitrariness on the part of those for whose benefit the statutes were enacted. This would be tantamount to committing the execution of such law to "the self-restraint of the executive branch" itself . . . and making the executive's ipse dixit final It would be grossly unfair . . . to force the supplier of information which carries some indicia of confidentiality under both § 1905 and Exemption 4, to rely wholly on the agency.⁷⁹⁴

The District of Columbia Circuit Court of Appeals in Charles River Park "A," Inc. v. HUD⁷⁹⁵ also concluded that de novo review was appropriate on the issue of whether material fell into exemption four: "(T)he district court is not reviewing agency action; it is making a threshold determination whether the plaintiff (submitter) has any cause of action at all."⁷⁹⁶ The Charles River analysis would apply the APA abuse of discretion standard to any disclosure of exempt material once the threshold issue of exempt status had been determined de novo. Thus, the court noted that if disclosure would violate the Trade Secrets Act, it would be an abuse of discretion for an agency to disclose.⁷⁹⁷ Other courts relied on the Declaratory Judgment Act⁷⁹⁸ to obtain a de novo hearing. Courts generally either found a reason for a de novo hearing or employed such scope of review without comment. If the legal analysis for a de novo hearing was later found to be weak, fairness to the submitter as well as practical necessity seemed, at the time, to justify the broader scope of review. The submitter was perceived to have an interest at least equivalent to the requester who enjoyed de novo review. Furthermore, agency records suitable for judicial review appeared to be nonexistent. Few had ever seen an agency record which did not have to be remanded to the agency for amplification.

Finally, there was the suspicion that the agency was not the proper party to conclude that substantial competitive harm will or will not result from disclosure. Or, at least, if the agency insisted on making such an important and complex determination, a full blown agency evidentiary hearing was in order, and if the agency would not employ so formal a proceeding, then de novo review in a federal district court was in order.

The beginning of the end of de novo review for submitters occurred in 1976 when Chrysler Corporation brought its reverse-FOIA case against the Department of Defense.⁷⁹⁹ The Delaware District Court followed Charles River Park and held an evidentiary hearing to ascertain if the requested material fell into exemption four. An APA review was made of the agency decision to disclose exempt material.⁸⁰⁰ Certain equal opportunity information was found to be exempt under exemption four. The court then applied the APA standard which provides for setting aside agency action which is contrary to law. An agency regulation forbids the agency to disclose information which would render any employee criminally liable for violating the Trade Secrets Act. Thus, the court found that an agency decision to disclose data in violation of the agency regulation would be contrary to law and a violation of the APA.⁸⁰¹

On appeal the Third Circuit Court of Appeals⁸⁰² found that de novo review was inappropriate. The court was not concerned with equivalent equity for the submitter, or with the inability to construct a record at the agency level, focusing instead on a legal analysis of those few instances where de novo review is warranted under the APA. Given that the submitter's basis for relief is found in the APA, the language of the APA scope of review provisions is the proper place to begin an analysis. Section 10(e) of the Administrative Procedure Act provides for the scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the applicability of

the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . . .

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.⁸⁰³

The Third Circuit Court of Appeals turned next to the test for de novo review under the APA provided by the Supreme Court in Overton Park v. Volpe.

De novo review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706(2)(F) in only two circumstances. First, such de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.⁸⁰⁴

Under the Overton Park test the Third Circuit dismissed de novo review by merely observing that (1) the Delaware District Court had not addressed whether a reverse-FOIA suit was adjudicatory or whether agency procedures were adequate; and (2) by noting the parties had not contended that issues had been presented to the district court which had not previously been presented to the agency.⁸⁰⁵ Commentators have supported this summary conclusion that the Overton Park test for de novo review is not met in reverse-FOIA cases.⁸⁰⁶ If the freedom of information process may be characterized as adjudicatory, then opponents of de novo review argue that either agency factfinding procedures are adequate, or if the procedures are perceived to be inadequate the deficiency is not the failure to gather all of the important facts to make the disclosure determination but the failure of the record to fully support the decision.⁸⁰⁷ Thus, if procedures are adequate to support agency adjudication and the true problem is merely an inadequate record, the remedy is not de novo review but remand to the agency for amplification of the rationale for the agency

disclosure decision.⁸⁰⁸ Submitters may argue that the problem is more than merely typing up a complete record--that agency procedures are fundamentally deficient in that there is insufficient opportunity to provide a meaningful input at the agency level. If submitters could demonstrate that a full evidentiary hearing was necessary at the agency level, then the absence of such agency proceedings would be the type of proof needed to meet the first of the Overton Park tests for de novo review. If submitters have not been afforded notice and an opportunity to comment, they may argue that the deficient agency procedures warrant de novo review.

De novo review is also authorized by the Overton Park analysis when issues not before the agency are raised in a judicial proceeding to enforce nonadjudicatory agency action. Agency proceedings to determine whether to honor a requester's demand for disclosure or a submitter's demand for confidentiality probably do not represent nonadjudicatory agency action, but even if such proceedings could be so characterized, the freedom of information issues before the court are normally the same issues which were before the agency. Neither of the Overton Park tests provides a clear case for de novo review.

The Supreme Court in Chrysler⁸⁰⁹ rejected the Information Act and the Trade Secrets Act as a basis for action, in a reverse-FOIA suit, then at the end of its opinion turned to the APA. With little discussion the Court concluded that "we believe any disclosure that violates § 1905 is 'not in accordance with law' within the meaning of 5 U.S.C. § 706(2)(A). De novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905."⁸¹⁰ Proponents of de novo review may argue that the Court was dealing with material exempt from mandatory disclosure under exemption four and that a section 706(2)(A) standard of review is appropriate at that stage. This, after all, was the Charles River

Park analysis: de novo review on the issue of material falling within an exemption and an arbitrary and capricious standard of review for an agency decision to disclose the exempt material. However, the Supreme Court had before it the Third Circuit's opinion that a de novo review had no place in any stage of a reverse-FOIA suit, and did not explicitly reverse that position. Generally, it may be argued that the issue of exempt status is a reviewable part of the agency decision to the same degree as the issue of the disclosure of exempt material. Finally, if a de novo review will "ordinarily not (be) necessary" to determine if disclosure will violate the Trade Secrets Act, then it is doubtful that a de novo review will be necessary to ascertain if data falls within exemption four.⁸¹¹ In fact, it is doubtful that requesters would enjoy de novo review of the agency decision to withhold material if that right were not explicitly provided by the Information Act. Requesters probably need this right more so than submitters since the submitter knows what is in the requested document and can effectively argue against disclosure at the agency level, if given notice, in contrast with requesters. Congress perceived a need for requesters to be able to tap federal district courts for a fresh look at their requests; for submitters to have the same right, in light of Chrysler, amendment of the Information Act will probably be necessary. However, the House Committee on Government Operations, after reviewing the issue, has indicated approval of the APA "arbitrary and capricious" standard for submitters and no interest in extending de novo review.⁸¹² Absent amending legislation, when a requester brings a direct-FOIA suit against the agency and the submitter, the scope of review will be de novo. If a submitter brings a reverse-FOIA suit against the agency and requester, the scope of review will probably be the "arbitrary, capricious . . . abuse of discretion, or otherwise not in accordance with law" standard. If the agency intends to issue a partial denial, releasing in part and withholding in part, and all parties are

joined then theoretically both standards of review could be employed for the respective claims of requester and submitter. Such a bifurcated arrangement should not be any more confusing than the Charles River analysis which provided for a de novo hearing on the issue of exempt material, and an APA review on the issue of disclosing exempt material.

Other procedural considerations of interest include the burden of proof, in camera inspections, injunctions, sanctions against employees, and award of attorney's fees and court costs. These topics will be discussed in the remaining sections of this chapter.

Burden of Proof

The Information Act provides that the burden of proof in a direct-FOIA suit rests on the agency.⁸¹³ Such placement of the burden of proof is consistent with the Act's philosophy of disclosure. If an agency intends to withhold material requested under the Information Act the agency must demonstrate that the material is exempt from mandatory disclosure and that it does not abuse its discretion in the decision to withhold exempt material. Such placement of the burden of proof is probably also a practical necessity in light of the fact that the plaintiff-requester has not had the opportunity to examine the information at issue.

The burden of proof is placed on the plaintiff-submitter in a reverse-FOIA suit. This burden is effectively placed on the submitter by the language of the Information Act which commands an agency to disclose non-exempt material. The submitter must show that the information was both exempt from mandatory disclosure and that the agency would abuse its discretion by releasing material the Act did not require to be disclosed.⁸¹⁴

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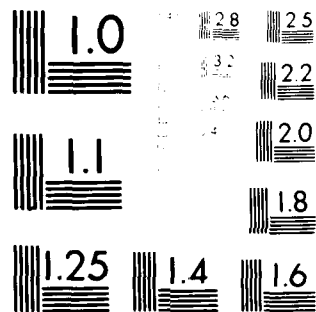
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In Camera Inspection

The Information Act provides that a federal district court may examine material in camera to assist the court in its determination of whether the material may be withheld by the agency.⁸¹⁵ In camera inspection of the requested material involves inspection in chambers by the district judge, or by a special master appointed by the judge. This procedure is not useful in the normal reverse-FOIA suit since both submitter and agency have access to the contents of the requested documents. The procedure may be useful, however, in the direct-FOIA suit where the requester does not have access to the desired documents. In camera inspection was specifically mentioned in the 1974 Amendments to the Information Act.⁸¹⁶

Use of in camera inspection is discretionary with the court, and a motion for such procedure may be denied if the court deems it unnecessary. In camera inspection of voluminous documents may be burdensome even if deemed necessary; thus samples⁸¹⁷ of documents may be inspected or a special master⁸¹⁸ may be appointed. The government may submit affidavits or live testimony as a substitute for in camera inspection. Particularly in national security cases the government may attempt to avoid in camera inspection of documents involving the national security, arguing that the affidavits and testimony are adequate.⁸¹⁹ The District of Columbia Circuit Court of Appeals essayed at length on the subject in Ray v. Turner, a 1978 case:

Congress left the matter of in camera inspection to the discretion of the district court, without any indication of the extent of its proper use. The ultimate criterion is simply this: Whether the district judge believes that in camera inspection is needed in order to make a responsible de novo determination on the claims of exemption.

In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that "it can't hurt." When an agency affidavit or other showing is specific, there may be no need for in camera inspection.

On the other hand, when the district judge is concerned that he is not prepared to make a responsible de novo determination in the absence of in camera inspection, he may proceed in camera without anxiety that the law interposes an extraordinary hurdle to such inspection.

.
 A judge has discretion to order in camera inspection on the basis of an uneasiness or a doubt he wants satisfied before he takes responsibility for a de novo determination.⁸²⁰

Injunctions, Sanctions, and Attorney's Fees

The Information Act provides that the requester's remedy is to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."⁸²¹ Similarly, in reverse-FOIA suits, the Administrative Procedure Act provides that agency action, such as the contemplated disclosure of confidential business data, may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸²² The Information Act does not provide damages to requesters for wrongful agency withholding, but does provide for attorney's fees and court costs under certain circumstances⁸²³ and provides the possibility of disciplinary action against government employees responsible for the improper withholding of records.⁸²⁴ The process leading to sanctions against employees is an involved one which has been outlined in an earlier chapter.⁸²⁵ Essentially, if a court orders disclosure, assesses attorney's fees and costs against the agency, and finds "that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding,"⁸²⁶ then the Special Counsel of the Merit System Protection Board conducts an investigation and directs the agency involved to take disciplinary action if warranted by the facts. Contempt proceedings are also available against employees who refuse to release material ordered to be disclosed by a district court.⁸²⁷ Both procedures are available, but largely unused. Arbitrary and capricious conduct would probably be found only if agency records which clearly should be disclosed were either withheld or destroyed. It is easier to meet the test for attorney's fees and costs: the requester must have "substantially prevailed."⁸²⁸

The Senate's version of the 1974 Amendments outlined four criteria to be employed in the award of attorney's fees and court costs: "(T)he court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the government's withholding of the records sought had a reasonable basis in law."⁸²⁹ This language was deleted from the final version. However, Congress still expected these factors to be considered by federal courts and omitted them only because "the existing body of law on the award of attorney's fees recognizes such factors, (such that) a statement of the criteria may be too delimiting and is unnecessary."⁸³⁰ Congress was thinking of reporters, indigents, nonprofit public interest groups and scholars when it provided for attorney's fees and costs, and not of the corporate requester attempting to obtain information concerning competitors. This became clear upon examining the Senate's amplification of the four criteria included in its original version of the 1974 Amendments:

Under the first criterion a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public, but it would not award fees if a business was using the FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government.

Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group but would not if it was a large corporate interest (or representative of such an interest). For the purposes of applying this criterion, news interests should not be considered commercial interests.

Under the third criterion a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature.

Finally, under the fourth criterion a court would not award fees where the government's withholding has a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester.

(T)here will seldom be an award of attorneys' fees when the suit is to advance the private commercial interests of the complainant. In these cases there is usually no need to award attorneys' fees to insure that the action will be brought. The private self-interest motive of, and often pecuniary to, the complainant will be sufficient to insure the vindication of the rights given in the FOIA. The court should not

ordinarily award fees under this situation unless the government officials have been recalcitrant in their opposition to a valid claim or have been otherwise engaged in obdurate behavior.⁸³¹

An example of a court perceiving "obdurate behavior" was the federal district court in Shermco Industries, Inc. v. United States Air Force.⁸³² The court found no public benefit to be derived from the direct-FOIA suit, a primarily commercial interest on the part of Shermco and no financial need on Shermco's part which would warrant consideration. However, the court also found that the Air Force had asserted unreasonable claims of exemption, had unreasonably asserted the doctrine of exhaustion of agency remedies, and that Shermco had almost completely prevailed on the merits. The court awarded \$4,500 in attorney's fees.⁸³³ On appeal this award of attorney's fees was reversed along with the order to release since Shermco had no longer "substantially prevailed."⁸³⁴ The district court case illustrates that a court may employ its discretion to award attorney's fees and costs when it perceives an element of arbitrariness in an agency's action.⁸³⁵ The court may balance the above outlined factors, but has considerable discretion to weigh the factors as it deems appropriate.

The Information Act speaks of assessing costs against the government when the "complainant" has substantially prevailed.⁸³⁶ The submitter is the "complainant" in a reverse-FOIA suit. However, it is doubtful that the submitter would be awarded attorney's fees and court costs under the present Act, since the complainant must substantially prevail "in any case under this section."⁸³⁷ The submitter brings a reverse-FOIA suit under the APA rather than the Information Act. Furthermore, it is clear that Congress did not contemplate a reverse suit brought by submitters, and intended that language in the 1974 Amendments apply only to requesters in direct-FOIA suits. It is equally doubtful that a requester who intervenes or is joined as a defendant in a reverse-FOIA suit is entitled to attorney's fees and costs if the requester

and the government substantially prevail against the submitter. First, the requester is not a "complainant" under this scenario. Second, the Act only provides for award of fees against the government. Under these facts the requester does not substantially prevail against the government; the government was a fellow defendant which substantially prevailed with the requester against the submitter. Award of attorney's fees and court costs against the government would be questionable in a scenario other than a direct-FOIA suit wherein the requester substantially prevails.⁸³⁸

CONCLUSION

This is good for you, and it's good for the public, and it's going to be done no matter what.⁸³⁹ Government attorney's view, 1973.

Although Exemption 4 of the Act was intended to grant some measure of protection to . . . business information the exemption has been interpreted and applied in ways which eviscerate the intended protection.⁸⁴⁰ Submitter attorney's view, 1977.

(T)he battle has not yet been entirely won.⁸⁴¹ Public interest requester's view, 1979.

The Freedom of Information Act has joined religion and politics as a topic of discussion almost certain to produce disagreement and debate. One's perceptions are inevitably influenced by the nature of one's current vocation. The perspective of the director of contracts of a defense contractor is different from that of the harried government bureaucrat, and both are different from the perspective of the head of a public interest group. Of course, when dealing with exemption one (national security) and exemption five (internal memoranda) a two-party dispute is the normal scenario. The requester desires certain documents and the government must decide whether to claim that damage to the national security or to the deliberative process would result from disclosure. A more complex scenario is the three-party dispute over data which centers on exemption four. The business records exemption invariably involves a submitter, an agency, and a requester.

The public interest requester remains unimpressed with the government's implementation of the Information Act. The perception in this quarter is that agencies remain dedicated to secrecy:

Many (bureaucrats) use delaying tactics, charge unreasonable fees, and act capriciously when faced with requests

. . . .

The most common method used by bureaucrats to protect agencies against embarrassing disclosures is to charge high fees for documents and to take months to deliver them⁸⁴²

Such charges may surprise the Department of Defense freedom of information managers who waive all fees under thirty dollars and generally achieve the time standards imposed by the 1974 Amendments. The difficulties public interest groups and reporters perceive with regulatory and investigatory agencies inevitably impact acquisition-oriented agencies. If the FBI, due to the volume of requests and a lack of personnel, takes eight months⁸⁴³ to fill a request, the general conclusion of public interest groups will be that implementation of the Act leaves something to be desired. Under this view there must be no relaxation of the provisions of the Act. This will be the difficulty encountered by proponents of amendments to the Act to make exemption four mandatory or to provide submitters with the right to an agency appeal or de novo judicial review.⁸⁴⁴ Those dissatisfied with any part of the implementation will not tend to favor recommendations which might foster the withholding of more information or delay a disclosure date.

With respect to business data, requesters often perceive themselves pitted against large firms with full war chests capable of funding extended litigation. Public interest requesters suspect that corporations swing their legal machinery into action to deny data if possible, but equally important, to delay its disclosure and to force requesters to pay a price for it. The perceived philosophy is, "If we make it too easy for requesters, we just encourage them." Furthermore, requesters are no doubt still smarting over their losses in Consumers Union, first the procedural loss, then the substantive loss, both at the Supreme Court level.⁸⁴⁵ If submitters are provided timely notice of impending disclosure, they may file a reverse-FOIA suit in a forum inconvenient to requesters, and perhaps secure injunctive relief, thereby effectively denying the venue advantages provided requesters by the 1974

Amendments. Public interest requesters will surely resist any relaxation of the Act, and will probably argue for a legislative remedy to cure perceived defects such as this loss of venue advantage. Requesters, of course, do not view submitters as their only adversary. The agency is the other opponent. Mr. Morton Halperin, the Director of the Project on National Security and Civil Liberties, and no stranger to the Information Act, outlines the view of many requesters:

Government officials have a number of notions that seem to be inherent in the nature of a government official. One of them is that their functions are defined by some mystical process, rather than by Congress' definition of what an agency is supposed to do. Those of you who deal with agencies on the Freedom of Information Act will often hear the comment, "We have all these requests under the Freedom of Information Act and they keep us from doing what we are supposed to do." I keep trying to suggest to them that what they are supposed to do is decided by Congress, and Congress has told them that they are supposed to process requests under the Freedom of Information Act and give out information. I have yet to find a government official who has internalized that, *i.e.*, who sees that as part of the job of the operating official of an agency.

In effect, what the Freedom of Information Act proposed to do, as it was being debated in the late 1960s, was to suddenly take government information from a category wherein it was a privilege for a person to have access to it, and to make it a right, subject to the procedures and exemptions of the Act.⁸⁴⁶

If requesters may be said to possess a certain viewpoint, then the firm which is both a requester and a submitter may be suffering from a corporate identity crisis. The stereotyped corporate submitter of business data has carved out its own position on the Information Act, at least since the 1974 Amendments. The 1974 Amendments were a clear signal from Congress that the policy of federal information disclosure was not to be ignored, but implemented. Other "setbacks" for submitters include the National Parks substantial competitive harm test,⁸⁴⁷ the conclusion that the exemptions are permissive not mandatory, and the probable replacement of de novo review with an Administrative Procedure Act review of the agency record in reverse-FOIA cases. Submitters can never be certain if their sensitive data will be disclosed once tendered into the custody of an agency. The submitter loses control at that point and often

can only regain it at considerable cost. Submitters do not know for certain if they will be given notice of a request or of impending disclosure. Submitters do not know if an agency understands the importance to a competitor of seemingly innocuous data, particularly since releasing authorities are normally decentralized. Submitters do not know how hard agencies will fight to protect data admittedly sensitive. Once a submitter tenders sensitive data into the hands of an agency all of these uncertainties are introduced. A cost-benefit analysis is also introduced: the value of the data as compared to the cost of litigation to protect it. Inevitably, the break-even point will stabilize at a higher level of data disclosure than existed prior to the Information Act. Of course, the Act does not introduce these uncertainties in a vacuum. To the degree possible submitters will react to the potential for disclosure. Is less data being tendered to the government? Is sensitive data, to the extent possible, being retained at the home office? The Information Act, at least since 1974, has produced a revolution in the file cabinet. Firms which could once be relatively certain that the government could keep a secret are no longer certain.

The focus of the attentions of both submitters and requesters is the custodian agency. Perhaps the only certainty is that requesters and submitters and Congress will never unanimously approve of agency implementation of the Act. Federal agencies are in a no-win position, and will be forgiven if they perceive a modicum of irony in the statutory scheme established to insure freedom of information: Congress, which is not subject to the Information Act, has provided for the federal judiciary, which is not subject to the Information Act, to insure that the executive branch complies with the Information Act. The executive branch went on record against the Act in 1967 and went on record against the amendments in 1974. The degree of compliance achieved to date has been at a substantial cost in resources; if public interest groups desire

the FBI and other agencies to respond to requests within ten days, they should support budget requests for the necessary personnel. However, the true and unmeasurable cost of the Information Act stems from re-aligned priorities. The 1974 Amendments have forced agencies to subordinate, to a degree, more traditional reasons for an agency's existence.

Agencies have drawn a difficult task. Agencies must promote Open Government, opening their file cabinets to the greatest extent possible, and at the same time must be sensitive to the privacy interests of business submitters with whom they deal today and intend to deal tomorrow. Custodial field units of agencies are expected to apply tests for exemption from mandatory disclosure as to which learned judges have provided conflicting answers. If data finds its way into the shelter of an exemption, the task is not completed, for then the agency's discretion must be exercised, properly, before requesters and submitters who will seldom be equally satisfied. In the face of the competing interests, it is not possible to embrace an absolutist view. There are equally laudatory competing interests. Disclosure of certain data may be likely to cause substantial competitive harm to a firm. Disclosure of the same data may also focus the spotlight on fraud, waste, and abuse in the acquisition process. For all of these reasons summary comments are not easily made. Perhaps the only conclusion that can be drawn is the very basic one written by thoughtful commentators in 1978:

(T)he FOIA has created an involuntary communication channel among competitors. In the short term, this may provide a differential advantage to those most able to exploit this channel while at the same time protecting their own information. In the longer run, the FOIA may raise the general level of available competitive information.⁸⁴⁸

FOOTNOTES

1. Statement by President Johnson upon signing Pub. L. No. 89-487, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT ii (1967) (hereinafter cited as 1967 MEMORANDUM). The Freedom of Information Act was enacted as Pub. L. No. 89-487, 80 Stat. 250 (1966) and codified by Pub. L. No. 90-23, 81 Stat. 54 (1967) at 5 U.S.C. § 552 (1976). The Act was amended in the 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974) and in the Government in the Sunshine Act, § 4, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976). Significant legislative materials on the 1966 Act are collected in SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK, 93d Cong., 2d Sess. 24 (1974) (hereinafter cited as 1974 SOURCE BOOK). Significant legislative materials on the 1974 amendments are collected in SUBCOMM. ON GOV'T INFORMATION AND INDIVIDUAL RIGHTS OF THE COMM. ON GOV'T OPERATIONS, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, 94th Cong., 1st Sess. (1975). For a concise and interesting history of the Information Act and its amendments, see J. O'REILLY, FEDERAL INFORMATION DISCLOSURE chs. 2-3 (1978).

2. Administrative Procedure Act of 1946, ch. 324, § 3, 60 Stat. 238 (1946) (formerly codified at 5 U.S.C. § 1002 (1964)).

3. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 3 (1966), reprinted in 1974 SOURCE BOOK, supra note 1, at 24.

4. H.R. REP. NO. 1497, id., at 5-9, reprinted in 1974 SOURCE BOOK, supra note 1, at 26-30; S. REP. NO. 813, 89th Cong., 1st Sess. 5 (1965), reprinted in 1974 SOURCE BOOK, supra note 1, at 4.

5. S. REP. NO. 813, id.

6. 5 U.S.C. § 552 (1976). One commentator notes that due to congressional adjournment, President Johnson was presented with the opportunity to pocket veto S. 1160. He signed the unopposed bill on the last day before its demise, the Fourth of July. J. O'REILLY, supra note 1, § 2.04 at 2-11, 2-12.

7. S. REP. NO. 813, supra note 4, at 3-4, reprinted in 1974 SOURCE BOOK, supra note 1, at 38-39; H.R. REP. NO. 1497, supra note 3, at 2-4, reprinted in 1974 SOURCE BOOK, supra note 1, at 23-25.

8. J. O'REILLY, supra note 1, §§ 2.01 at 2-1, 2.04 at 2-11, 3.03 at 3-9.

9. 5 U.S.C. § 552(b)(1)-(9) (1976).

10. 5 U.S.C. § 552(a)(3) (1976).

11. 5 U.S.C. § 552(a)(4)(B) (1976).

12. Nader, Freedom from Information: The Act and the Agencies, 5 HARV. C.R.-C.L. L. REV. 1,2 (1970).

13. "(T)o call these exemptions loopholes would be to understate their avoidance potential." Id., at 4.

14. Id., at 8-10.

15. 5 U.S.C. § 552(a)(6)(A),(B) (1976).

16. 5 U.S.C. § 552(a)(4)(B) (1976).

17. 5 U.S.C. § 552(a)(4)(A) (1976).

18. 5 U.S.C. § 552(a)(4)(E) (1976).

19. 5 U.S.C. § 552(a)(4)(F) (1976).

20. 5 U.S.C. § 552(a)(4)(G) (1976).

21. The Washington Post, May 29, 1975, at A4.

22. The Los Angeles Times, Jun. 12, 1966, reprinted in 1974 SOURCE BOOK, supra note 1, at 65.

23. Honolulu Star Bulletin, reprinted in 1974 SOURCE BOOK, supra note 1, at 84.

24. Newsweek, Jun. 19, 1978, at 85.

25. Morrison, Obtaining Access to Information in the Files of Government Agencies: The Public Interest Perspective, 34 BUS. LAW. 983, 988 (1979).

26. Id.

27. The Washington Post, Jun. 27, 1979, at A15.

28. H.R. REP. NO. 918, 88th Cong., 1st Sess. 63 (1963).

29. H.R. REP. NO. 1497, supra note 3, at 5, reprinted in 1974 SOURCE BOOK, supra note 1, at 26.

30. See Caron, Federal Procurement and The Freedom of Information Act, 28 FED. B.J. 271, 273-74 (1968).

31. 5 U.S.C. § 552(a)(1) (1976).

32. 5 U.S.C. § 552(a)(2) (1976).

33. 5 U.S.C. § 552(a)(3) (1976). See, generally, J. O'REILLY, supra note 1, ch. 6 and K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE §§ 5:4 at 314, 5:10-5:18 at 338 (2d ed. 1978).

34. HOUSE COMM. ON GOV'T OPERATIONS, FREEDOM OF INFORMATION ACT REQUESTS FOR BUSINESS DATA AND REVERSE-FOIA LAWSUITS, H.R. REP. NO. 95-1382, 95th Cong.,

2d Sess. 12 (1978).

35. The Washington Post, Jul. 12, 1976, at 27.

36. Kozicharow, Information Act in Contracting, AV. W. & SPACE TECH., Feb. 7, 1977, at 19.

37. 1967 MEMORANDUM, supra note 1, at 23.

38. Act of Jul. 7, 1943, § 1, 57 Stat. 380, 44 U.S.C. § 366 (1964).

39. 44 U.S.C. § 3301 (1976).

40. 1967 MEMORANDUM, supra note 1, at 23. See also H.R. REP. NO. 1497, supra note 3, at 8, reprinted in 1974 SOURCE BOOK, supra note 1, at 29: "Federal agency records which are available for public inspection also must be available for copying, since the right to inspect records is of little value without the right to copy them for future reference."

41. See, e.g., 32 C.F.R. § 806.6(h) (1980) (Air Force) and 41 C.F.R. § 105-60.103(a) (1980) (General Services Administration).

42. 325 F. Supp. 130 (D. Kan. 1971), aff'd on other grounds, 460 F.2d 671 (10th Cir. 1972), cert. denied, 409 U.S. 966 (1972). The Tenth Circuit upheld agency nondisclosure based on exemption three (nondisclosure statutes), thereby avoiding the "records" issue. Id., at 673-74. Similarly, the court in Weisberg v. Dep't of Justice, 489 F.2d 1195, 1197 (D.C. Cir. 1973) approved nondisclosure of the Kennedy assassination materials requested in Nichols by invoking exemption seven (investigatory files compiled for law enforcement purposes).

43. Id., at 134-35.

44. Id., at 135-36.

45. Id., at 137.

46. 404 F. Supp. 407 (N.D. Cal. 1975).

47. Id., at 411.

48. Long v. IRS, 596 F.2d 362, 364-65 (9th Cir. 1979).

49. 400 F.2d 885 (10th Cir. 1968), followed in United States v. Dingle, 546 F.2d 1378, 1381 (10th Cir. 1976).

50. Id., at 885-86. See 5 U.S.C. § 551(1)(B) (1976).

51. 595 F.2d 521 (9th Cir. 1979).

52. Id., at 522-23.

53. Id., at 523.

54. No. 76-1800 (D.C. Cir. May 23, 1978).

55. Id., slip op. at 3.
56. Id., slip op. at 7-8 n.30 (emphasis added).
57. Id.
58. Id., slip op. at 7, 13. See 5 U.S.C. § 551(1)(A) (1976).
59. Id., slip op. at 11.
60. Id., slip op. at 11-12.
61. Id., slip op. at 13. For the opposing view, see id., slip op. at 5-13 (Bazelon, J., dissenting).
62. 556 F.2d 214 (3d Cir. 1977).
63. Id., at 218 n.4 (emphasis in original).
64. This result is not unanimous. For an example of the opposing view, which expressly considered and rejected Masonic Homes, see Howard Johnson Co. v. NLRB, 444 F. Supp. 843 (E.D. Mich. 1977) (union cards disclosed to employer).
65. Masonic Homes v. NLRB, 556 F.2d 214, 218 n.4 (3d Cir. 1977).
66. 64 A.B.A.J. 533 (1978).
67. Defense Acquisition Regulation (DAR) § 3-507.1(a) (1976) (hereinafter cited as DAR § ____).
68. DAR § 4-913(c) (Defense Acquisition Circular 76-9, Aug. 30, 1977) (hereinafter cited as DAC).
69. Goland v. CIA, No. 76-1800, slip op. at 8 (D.C. Cir. May 23, 1978) (dissenting opinion). Judge Bazelon cited two examples: "Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974) (grant application submitted to National Institute of Mental Health by noncommercial research scientist); Irons v. Gottschalk, 369 F. Supp. 403 (D.D.C. 1974) (patent applications)." Id.
70. No. 76-1308 (D.C. Cir. Jul. 11, 1978).
71. Id., slip op. at 16 n.19, 18.
72. Id., slip op. at 16 n.19.
73. Id.
74. Id., slip op. at 5.
75. Id., slip op. at 5-6.
76. Id., slip op. at 7.
77. Id., slip op. at 8-9.

78. Id., slip op. at 15 and 6-16 (Bazelon, J., dissenting).

79. Id., slip op. at 15.

80. Id., slip op. at 16. Judge Leventhal distinguished between the power to obtain records as in this case, and the duty to obtain records, which would create agency records though yet unobtained. Id., slip op. at 16 n.18. In a separate opinion, Judge MacKinnon labels the distinction dictum which should be considered in a proper case. Id., slip op. at 2 (MacKinnon, J., concurring).

81. Id., slip op. at 16 n.19.

82. Id.

83. Id., slip op. at 20.

84. 428 F. Supp. 523 (S.D.N.Y. 1977).

85. Id., at 529.

86. Forsham v. Califano, No. 76-1308, slip op. at 6 n.9 (D.C. Cir. Jul. 11, 1978) (dissenting opinion).

87. Ciba-Geigy Corp. v. Mathews, 428 F. Supp. 523, 530-31 (S.D.N.Y. 1977).

88. 64 A.B.A.J. 533, 534 (1978).

89. 1967 MEMORANDUM, supra note 1, at 34.

90. 44 U.S.C. § 3301 (1976), quoted in U.S. DEP'T OF DEFENSE, AVAILABILITY TO THE PUBLIC OF DEP'T OF DEFENSE INFORMATION VB, at 4 (DOD Directive 5400.7, Feb. 14, 1975), reprinted as DAR app. L (1976).

91. Id., VB4, at 4 (emphasis in original). The same concept is found in the latest publication of DOD guidance. See 45 Fed. Reg. 80,503 (Dec. 5, 1980) (to be codified in 32 C.F.R. § 286.13(c)).

92. See 32 C.F.R. § 806.6(h)(3) (1980) (Air Force definition of "records"); 32 C.F.R. § 701.4(c) (1979) (Navy definition of "records"); and 32 C.F.R. § 518.2 (1979) (Army definition of records omitting "valuable property" concept). An interesting example of the division among the military departments is found in Siemens Corp. v. DOD, No. 78-0385 (D.D.C., filed Mar. 3, 1978), 746 FED. CONT. REP., Aug. 28, 1978, at A5. Ninety-two documents were requested from various DOD departments and agencies. The bulk of the requests (seventy-one) were for Army documents, some of which probably contained "valuable property" in documentary form. The Air Force used exemption four in conjunction with the "valuable property" concept to support nondisclosure; the Navy used exemptions three and five in conjunction with the "valuable property" concept; the Army used exemptions three, four and five and excluded the "valuable property" concept as its regulations implied it would. The case was settled out of court.

93. 301 F. Supp. 796 (S.D.N.Y. 1969).

94. Id., at 806.

95. No. 78-0385 (D.D.C., filed Mar. 3, 1978). See 746 FED. CONT. REP., Aug. 28, 1978, at A5.

96. Id., Order at 8, filed Jul. 10, 1979 (Margolis, J.).

97. 5 U.S.C. § 552(a)(3) (1976).

98. 504 F.2d 238, 253 (D.C. Cir. 1974). The Administrative Procedure Act distinguishes between substantive rules and interpretive rules. 5 U.S.C. § 553(b),(d) (1976). Substantive rules are accorded the force and effect of law; interpretive rules are accorded varying degrees of deference. See Chrysler v. Brown, 99 S. Ct. 1705, 1717-25 (1979). To be substantive, a rule must (1) affect individual rights and obligations, (2) be issued pursuant to a statutory authority which reasonably contemplates the rule, and (3) comply with the procedural requirements of the APA of notice and opportunity to comment.

A definition of "records" is arguably substantive, though a mere definition, in that it governs the public's right to information and the confidentiality rights of those who submit information. The procedural requirements of 5 U.S.C. § 553(b) and (d) (1976) are hurdles, but not insurmountable ones. The nexus between the defining regulation and the delegation of the legislative authority to promulgate rules provides more difficulty. Where is the authorizing statute for a definition of "agency records" to implement the Information Act? One candidate is the Housekeeping Statute, 5 U.S.C. § 301 (1976), which authorizes rules of procedure to govern agency affairs. Another candidate is the Information Act itself, which authorizes rules concerning uniform charges for records (§ 552(a)(4)(A)), procedural rules for obtaining unpublished and unindexed records (§ 552(a)(3)), and "published rules" for unpublished but indexed records (§ 552(a)(2)). However, regardless of whether the definition of "agency records" is "substantive" or merely "interpretive", the definition must be in reasonable conformance with the Information Act. If a rule is not in reasonable conformance with the Information Act, then it will either not be entitled to the force and effect of law or will be accorded little or no deference as an interpretive rule. Thus, an agency definition carving out a separate role for "valuable property" should be tested against the history and purpose of the Information Act.

99. S. REP. NO. 813, supra note 4, at 5, reprinted in 1974 SOURCE BOOK, supra note 1, at 40.

100. H.R. REP. NO. 1497, supra note 3, at 6, reprinted in 1974 SOURCE BOOK, supra note 1, at 27.

101. 5 U.S.C. § 552(a)(1)(A),(C) (1976).

102. 5 U.S.C. § 552(a)(2)(A),(C) (1976).

103. 5 U.S.C. § 552(a)(5) (1976).

104. H.R. REP. NO. 1497, supra note 3, at 5-6, reprinted in 1974 SOURCE BOOK, supra note 1, at 26-27.

105. Id.

106. See text at supra notes 29-30.

107. Caron, supra note 30, at 278.
108. H.R. REP. NO. 918, supra note 28.
109. 44 U.S.C. § 3301 (1976). See text at supra note 90.
110. See text at supra note 91. For an early commentator who examined the legislative history of the Information Act and concluded that subject records must relate to the function or operation of an agency, see Dobkin, The Release of Government Owned Technical Data Under the Freedom of Information Law: Between Scylla and Charybdis, 14 VILL. L. REV. 74, 75-79, 85 (1968).
111. Consumers Union, Inc. v. VA, 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).
112. Id., at 806 n.55.
113. 542 F.2d 1116, 1117 (9th Cir. 1976).
114. Id., at 1121.
115. Id., at 1118.
116. 42 U.S.C. § 276(c)(2) (1976). See K. DAVIS, supra note 33, § 5.20 at 368-69; Morrison, supra note 25, at 988; J. O'REILLY, supra note 1, § 5.03 at 5-8 n.10; and Note, What Is A Record? Two Approaches to the Freedom of Information Act's Threshold Requirement, 1978 B.Y.U. L. REV. 408, 423-25.
117. 5 U.S.C. § 552(a)(4)(A) (1976).
118. SDC Development Corp. v. Mathews, 542 F.2d 1116, 1119 (9th Cir. 1976).
119. 448 F.2d 1067 (D.C. Cir. 1971).
120. Id., at 1080.
121. WESTINGHOUSE RESEARCH LABORATORIES, EXPERIMENTAL RESEARCH ON FABRICATION OF INTERDIGITAL TRANSDUCERS FOR ACOUSTIC SURFACE WAVES ii (NTIS AD-A021 482, Aug. 19, 1975).
122. 15 U.S.C. §§ 1151-1157 (1976).
123. 15 U.S.C. § 1153 (1976).
124. 15 U.S.C. § 1525 (1976). See also 15 U.S.C. § 1526 (1976).
125. 15 U.S.C. § 1153 (1976). See also 5 U.S.C. § 552(a)(4)(A) (1976) and 15 U.S.C. § 1525 (1976).
126. Acquisition documents may be marked "For Official Use Only" (FOUO). This is not a security classification. FOUO markings are used to identify sensitive, unclassified material, such as source selection sensitive material. See Air Force Regulation (AFR) 70-15, Source Selection Policy and Procedures, Apr. 16, 1976. FOUO material is effectively (not literally) defined by the

Information Act. Thus, a nonexempt document marked FOUO must have the markings removed and the document disclosed pursuant to an Information Act request. In this case, the FOUO marking may have served a useful purpose--to identify the document as one warranting close scrutiny prior to release. A document which is exempt under, e.g., exemption four (business records) or five (internal memoranda) is properly marked FOUO. Of course, document sensitivity is often a function of time. For example, some source selection sensitive documents may be exempt from mandatory disclosure prior to award, and thus properly marked FOUO, while post-award some of the same documents may lose their sensitivity, warranting removal of the markings and disclosure. That is the reason all requested documents, whether marked FOUO, or classified, require a fresh review at the time of an Information Act request.

127. Pub. L. No. 93-502 (1974), amending 5 U.S.C. § 552(b)(1) (1976).

128. Pub. L. No. 90-23, 5 U.S.C. § 552(b)(1) (1967).

129. 5 U.S.C. § 1002 (1964), 60 Stat. 238.

130. 42 U.S.C. §§ 2014(y), 2161 (1976).

131. Exec. Order No. 10,501, 18 Fed. Reg. 7049 (1953), as amended by Exec. Order No. 10,816, 24 Fed. Reg. 3777 (1959); Exec. Order No. 10,901, 26 Fed. Reg. 217 (1961); Exec. Order No. 10,964, 26 Fed. Reg. 8932 (1961); Exec. Order No. 10,985, 27 Fed. Reg. 439 (1962); Exec. Order No. 11,097, 28 Fed. Reg. 2225 (1963); Exec. Order No. 11,382, 32 Fed. Reg. 16,247 (1967).

132. Exec. Order No. 11,652, 37 Fed. Reg. 5209 (1972), as amended by Exec. Order No. 11,714, 38 Fed. Reg. 10,245 (1973); Exec. Order No. 11,862, 40 Fed. Reg. 25,197 (1975); Exec. Order No. 12,038, 43 Fed. Reg. 4957 (1978); as implemented by National Security Council Directive of May 17, 1972, 3 C.F.R. § 1085 (1971-75 Comp.). The Department of Defense implemented Executive Order 11,652 at 32 C.F.R. § 159 (1978).

133. Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (1978), reprinted in 50 U.S.C.A. § 401 (West Supp. 1979).

134. Exec. Order No. 11,652, § 1(C), 37 Fed. Reg. 5209 (1972), as amended.

135. Id., § 1(B).

136. Id., § 1(A).

137. Id., § 1(B) (emphasis added).

138. Id., § 1(A) (emphasis added).

139. Exec. Order No. 12,065, § 1-104, 43 Fed. Reg. 28,950 (1978).

140. U.S. DEP'T OF DEFENSE, INFORMATION SECURITY PROGRAM REGULATION § 1-503, at 1-5 (DOD 5200.1-R, Air Force Regulation (AFR) 205-1, Dec. 1978) (hereinafter cited as DOD 5200.1-R or AFR 205-1, as appropriate.) "Munitions of war" involve military articles such as guns, tanks, and combat aircraft. See Borklund, How Defense Will Handle Critical-Technology Exports--and Why, GOV'T EXECUTIVE May 1979, at 15.

141. Id., § 1-501 at 1-4, § 1-502 at 1-5.
142. Exec. Order No. 12,065, § 1-301(e), 43 Fed. Reg. 28,951 (1978).
143. Id.
144. Id., § 1-302 at 28,951.
145. Id., § 3-303 at 28,952.
146. Id., § 1-602 at 28,953.
147. Air Force Regulation (AFR) 205-1, supra note 140, § 2-204d, at 2-3.
148. Exec. Order No. 12,065, §§ 1-201 to 1-203, 43 Fed. Reg. 28,950 (1978).
149. Id., § 1-204 at 28,951.
150. Id., § 1-4 at 28,952.
151. Id., § 1-5 at 28,952.
152. Id., § 3-1 at 28,954.
153. Id., § 4 at 28,957-59.
154. Ray v. Turner, 587 F.2d 1187, 1217 (D.C. Cir. 1978) (Wright, J., concurring). But see Halperin v. Dep't of State, 565 F.2d 699, 706-07 (D.C. Cir. 1977) (if procedural deficiencies occur, yet disclosure would allegedly constitute grave danger to the national security, then rather than order release, the court should examine materials in camera to determine whether they may be withheld according to the exacting standard used in First Amendment cases involving prior restraints).
155. 410 U.S. 73, 81 (1973).
156. Id., at 95.
157. 5 U.S.C. § 552(a)(4)(B) (1976).
158. Id.
159. 5 U.S.C. § 552(b) (1976).
160. 5 U.S.C. § 552(a)(4)(B) (1976).
161. S. REP. NO. 93-1200, 93d Cong., 2d Sess. 12 (1974).
162. DOD 5200.1-R, supra note 140, § 2-205 at 2-4.
163. 42 U.S.C. §§ 2014(y), 2161 (1976).
164. The full list includes the following: (1) Computer Network Technology, (2) Large Computer System Technology, (3) Software Technology, (4) Automated Real-Time Technology (including array processor technology, computer-

aided design and computer-aided manufacturing, command-control, and vehicular control), (5) Composite and Defense Materials Processing and Manufacturing Technology, (6) Directed Energy Technology (including particle beams, millimeter waves, and E-beam welding), (7) Large and Very Large Scale Integrated Circuits Design and Manufacturing Technology (current and advanced micro-electronic technology), (8) Military Instrumentation Technology (including infra-red, electronic, and electro-optical instrumentation), (9) Telecommunications Technology, (10) Guidance and Control Technology, (11) Microwave Componentry Technology, (12) Military Vehicular Engine Technology (including jet engine and advanced cruise missile engine technology), (13) Fiber Optics and Advanced Optics Technology, (14) Sensor Technology, and (15) Underseas System Technologies. Borklund, supra note 140, at 19.

Technology transfer was the subject of a report prepared by a Defense Science Board Task Force. The February 1976 report was entitled Export of U.S. Technology and is known as the Bucy Report, after the Texas Instruments chief executive, Mr. Fred Bucy, who chaired the Task Force. In the report "technology" was defined as engineering-manufacturing know-how. "Technology is not science and it is not products. Technology is the application of science to the manufacture of products and services. It is the specific know-how required to define a product that fulfills a need, to design the product, and to manufacture it. The product is the end result of this technology, but it is not technology." Mountain, The Continuing Complexities of Technology Transfer, GOV'T EXECUTIVE Jan. 1979, at 42. See also Borklund, id., at 19.

165. Borklund, id., at 21.

166. Mountain, supra note 164, at 45.

167. Borklund, supra note 140, at 15. "Lead time" has been defined as "the interval between the acquisition of knowledge by or on behalf of the Government of the United States and the time when the Government of the United States believes that the same knowledge is known to, or reasonably could be known to, the private community in the United States or to other nations through the application of their own resources." 32 C.F.R. § 159.202-6(a) (1978).

168. No. 78-0385 (D.D.C., filed Mar. 3, 1978), 746 FED. CONT. REP., Aug. 28, 1978, at A5.

169. ROURKE, SECRECY AND PUBLICITY, DILEMMAS OF DEMOCRACY 30 (1961), quoted in Horton, Release of Unclassified Research Results, 10 A.F. JAG L. REV. 6, 17-18 (1968).

170. DOD 5200.1-R, supra note 140, at ch. 5.

171. Id., at ch. 7.

172. Id., at ch. 8.

173. Id., at ch. 9.

174. Id., at ch. 6.

175. The Freedom of Information Committee of the American Society of Newspaper Editors issued a report for 1972-73 estimating that nearly 200,000 pages of classified data were produced on each working day of the government's

operation. The report also estimated that the National Archives contain some 760 million pages classified from the period 1942-62. J. O'REILLY, supra note 1, at 11-36 n.11.

176. Documents classified only after receipt of an Information Act request should perhaps be scrutinized more closely to insure the absence of foul play, but there are cogent reasons for attempting to rely on means of protection other than classification, as noted in the text. Should other protective devices fail, and should the material in question be properly classifiable, there should be no hesitation to consider classifying it, even after receipt of a request. See Exec. Order No. 12,065, § 1-606, 43 Fed. Reg. 28,953 (1978) and DOD 5200.1-R, supra note 140, § 2-204f at 2-3.

177. See text at infra notes 421-24.

178. 5 U.S.C. § 552(b)(3), (Supp. 1975).

179. H.R. REP. NO. 1497, supra note 3, at 10, reprinted in 1974 SOURCE BOOK, supra note 1, at 31.

180. See, e.g., the cases cited in FAA v. Robertson, 422 U.S. 255, 262 n.6 (1975).

181. Id.

182. 49 U.S.C. § 1504 (1976).

183. 422 U.S. at 263-67.

184. Id., at 269-70.

185. See text at supra note 179.

186. 422 U.S. at 265.

187. Government in the Sunshine Act, § 4, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247, codified at 5 U.S.C. § 552(b)(3) (1976). The amendment was effective March 12, 1977. Pub. L. No. 94-409, § 6 (1976).

188. H.R. REP. NO. 94-1441, 94th Cong., 2d Sess. 25 (1976).

189. 49 U.S.C. § 1504 (1976).

190. Pub. L. No. 95-504, § 39, 92 Stat. 1743 (1978).

191. Federal Aviation Act of 1958, § 1104, 49 U.S.C. § 1504 (1976).

192. H.R. REP. NO. 94-1441, supra note 188; 42 U.S.C. § 1306 (1976).

193. 42 U.S.C. § 1306 (1976). See J. O'REILLY, supra note 1, § 13.03, at 13-7 to 13-8 for an outline of the attempts to render this statute qualified under exemption three.

194. Pub. L. No. 91-184, § 7(c), 83 Stat. 845 (1969), 50 U.S.C. App. § 2406(c) (1976).

195. Id.

196. 574 F.2d 624 (D.C. Cir. 1978).

197. Id., at 629.

198. Id.

199. 7 U.S.C. § 136 (1976).

200. 7 U.S.C. § 136h(b) (1976): "(T)he Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential, except that, when necessary to carry out the provisions of this subchapter, information relating to formulas of products acquired by authorization of this subchapter may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator."

201. 7 U.S.C. § 136h(d),(e) (1976).

202. Similarly, the Toxic Substances Control Act provides that exemption four business records shall not be disclosed save under congressionally provided criteria. Pub. L. No. 94-469, § 14, 90 Stat. 2034 (1976) (to be codified at 15 U.S.C. § 2613).

203. See, e.g., 2 U.S.C. § 437g(a)(3) (1976) (H.R. REP. NO. 880, Part I, 94th Cong., 2d Sess. 23 (1976)); 26 U.S.C. § 6103 (1976) (*Fruehauf v. IRS*, 566 F.2d 574, 578 (6th Cir. 1977)); 35 U.S.C. § 122 (1976) (*Lee Pharmaceuticals v. Kreps*, 577 F.2d 610 (9th Cir. 1978)); 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1976) (H.R. REP. NO. 880, Part I, id.); 49 U.S.C. § 1461 (1976) (H.R. REP. NO. 880, Part I, id.); 50 U.S.C. §§ 403(d)(3), 403g (1976) (*Ray v. Turner*, 587 F.2d 1187, 1219-20 (D.C. Cir. 1978)). See also SENATE COMM. OF THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977 (S. 1437), S. REP. NO. 95-605, Part I, 95th Cong., 1st Sess. 509-10 (1977) which collected nondisclosure statutes and categorized them as follows:

A. Protection of trade secrets

Confidential information, in the form of trade secrets, is given protection in the areas of insecticides (7 U.S.C. 135b), agricultural products (7 U.S.C. 472, 610, 1373, 2105, 2623), flammability standards for fabrics (15 U.S.C. 1193), fair packaging and labelling requirements (15 U.S.C. 1454), toy safety (15 U.S.C. 1263), motor vehicle safety (15 U.S.C. 1401-1402), food and drugs (21 U.S.C. 331, 458, 842, 1037), tax matters (26 U.S.C. 6104), occupational health and safety standards (29 U.S.C. 664), radiation standards for electronic equipment (42 U.S.C. 263i), air and water pollution control devices (42 U.S.C. 1857f-6, 33 U.S.C. 1160 and 1163), boating safety (46 U.S.C. 1463), and pipelines (49 U.S.C. 1681).

B. Government benefits

Where certain "benefits" are applied for, confidential information is protected in the areas of visas (2 U.S.C. 1202), claims made to the Veterans' Administration (38 U.S.C. 3301), application for assistance from the Community Relations Service (42 U.S.C. 2000g-2), and patents for atomic weapons (42 U.S.C. 2181).

C. Information required to be given to the government

Protection here includes the areas of registration of aliens (8 U.S.C. 1304), census information (13 U.S.C. 9, 214 (a five-year felony)), and tax returns (26 U.S.C. 7213(a)(1)).

D. Miscellaneous

Other statutes protect crop information (18 U.S.C. 1902), information regarding future action of the Reconstruction Finance Corporation (18 U.S.C. 1904), information acquired by a bank examiner (18 U.S.C. 1906), information acquired by a farm credit examiner (18 U.S.C. 1907), information acquired by a National Agricultural Credit Examiner (18 U.S.C. 1908), and information under the Presidential Election Campaign Fund Act (26 U.S.C. 9012(g)).

It should be noted that existing laws also safeguard confidential information that relates to the national security (e.g., 18 U.S.C. 798) and prohibit speculation by Federal employees based on confidential information they have acquired during the course of their employment (e.g., 18 U.S.C. 1902-1904).

Yet another collection of nondisclosure statutes includes the following: 7 U.S.C. §§ 12, 472, 507, 608d, 955, 2105(c) (1970); 8 U.S.C. § 1202(f) (1970); 13 U.S.C. § 214 (1970); 15 U.S.C. §§ 176a (1970), 2055(a)(2) (Supp. V 1975); 21 U.S.C. § 346a(f) (1970); 35 U.S.C. § 122 (1970); 42 U.S.C. §§ 242m(d) (Supp. V 1975), 2000e(5)(b), 2181e (1970). Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Lawsuit, 55 TEX. L. REV. 587, 598 n.40 (1977).

204. 18 U.S.C. § 1905 (1976).

205. Id. Violations of the statute are punishable by removal from office, a fine of up to \$1,000, imprisonment for up to one year, or fine and imprisonment.

206. 1967 MEMORANDUM, supra note 1, at 32.

207. DAR § 1-329.3(c)(3) (1976).

208. See, e.g., 32 C.F.R. § 286.4(c)(3)(i) (1979) (Department of Defense); 32 C.F.R. § 806.23(c)(1) (1980) (Air Force); 32 C.F.R. § 518.14(c)(1) (1979) (Army); 32 C.F.R. § 701.24(c)(1) (1979) (Navy). Significantly, the latest DOD publication of its freedom of information regulations omits 18 U.S.C. § 1905 as an example of an exemption three statute. See 45 Fed. Reg. 80,507 (Dec. 5, 1980) (to be codified in 32 C.F.R. § 286.31(a)No.3).

209. SUBCOMM. OF THE HOUSE COMM. ON GOV'T OPERATIONS, HEARINGS ON H.R. 5012, 89th Cong., 1st Sess. 283 (1965) (cited by 28 agencies as authority for withholding information), cited in Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1717 n.29 (1979).

210. Chrysler Corp. v. Brown, id., at 1726 n.49. See Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1199-1203 (4th Cir. 1976) for an analysis which concludes that section 1905 is an exemption three statute.

211. 7 U.S.C. § 136h(b) (1976), as amended by Pub. L. No. 95-396, § 15(1) 92 Stat. 829 (1978).

212. But see thesis subsection beginning at infra p. 51.
213. 5 U.S.C. § 552(b)(3)(A) (1976).
214. H.R. REP. NO. 95-1382, supra note 34, at 58 n.211 (emphasis added).
215. 547 F.2d 673, 687 (D.C. Cir. 1976).
216. 422 U.S. 255, 265 (1975).
217. Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 687 (D.C. Cir. 1976).
218. American Jewish Congress v. Kreps, 574 F.2d 624, 629 (D.C. Cir. 1978) (emphasis in original).
219. Administrative Procedure Act, § 10(e), 5 U.S.C. § 706(2)(A) (1976).
220. See Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975).
221. See Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1726 (1979).
222. H.R. REP. NO. 880, Part I, supra note 203, at 23.
223. See Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1726 n.49 (1979). "Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905, and that therefore the FOIA might provide the necessary 'authoriz(ation) by law' for purposes of § 1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905" (emphasis added).
224. See cases collected id., at 1714 nn.18, 19.
225. 5 U.S.C. § 553(b),(d) (1976).
226. Chrysler Corp. v. Brown, 99 S. Ct. at 1718.
227. Id.
228. 5 U.S.C. § 553(b)-(e) (1976).
229. 41 C.F.R. § 60-1 (1979).
230. 41 C.F.R. §§ 60-40.2, 60-40.4 (1979).
231. 5 U.S.C. § 301 (1976).
232. Exec. Order No. 11,246, 3 C.F.R. § 339 (1964-65 Comp.), as amended by Exec. Order No. 11,375, 3 C.F.R. § 684 (1966-70 Comp.).
233. 519 F.2d 935, 942-43 (D.C. Cir. 1975).

234. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1186-88 (3rd Cir. 1977).
235. Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1199-1201 (7th Cir. 1978).
236. General Dynamics Corp. v. Marshall, 572 F.2d 1211, 1216-17 (8th Cir. 1978).
237. See, e.g., in addition to the cases cited in supra notes 234-36, H.R. REP. NO. 95-1382, supra note 34, at 59 and Clement, supra note 203, at 617-24.
238. 99 S. Ct. 1705 (1979).
239. Id., at 1718.
240. Id., at 1718-23.
241. Id., at 1723-24.
242. Id., at 1726 n.49.
243. 5 U.S.C. § 706(2)(A) (1976).
244. 99 S. Ct. at 1726.
245. Id., at 1712-14.
246. See Clement, supra note 203, at 619-21.
247. 5 U.S.C. § 552(b) (1976).
248. 99 S. Ct. at 1718-19.
249. 32 C.F.R. § 286.4(b) (1979). This language is found in the July 1, 1979 version of the DOD's information disclosure regulation. The latest version, effective November 3, 1980, retains the "significant and legitimate governmental purpose" test for nondisclosure but omits 18 U.S.C. § 1905 as an example. 45 Fed. Reg. 80504, 80506 (Dec. 5, 1980) (to be codified in 32 C.F.R. §§ 286.14(e), 286.30(b)).
250. 5 U.S.C. § 301 (1976).
251. See Chrysler Corp. v. Brown, 99 S. Ct. at 1721.
252. Id., at 1722 n.41.
253. 104 CONG. REC. 6550 (1958).
254. Clement, supra note 203, at 622.
255. Id. (emphasis in original).
256. Chrysler Corp. v. Brown, 99 S. Ct. at 1722.

- 257. 5 U.S.C. § 553(b),(d) (1976).
- 258. Chrysler Corp. v. Brown, 99 S. Ct. at 1723.
- 259. Id., at 1718-21.
- 260. 41 C.F.R. § 60-40.2 (1979).
- 261. Clement, supra note 203, at 624.
- 262. 3 C.F.R. § 339 (1964-65 Comp.).
- 263. 42 U.S.C. §§ 2000d-2000d-4, 2000e-2000e-17 (1976).
- 264. Pub. L. No. 81-152, 63 Stat. 377 (1949), as amended, 40 U.S.C. §§ 471-514 (1976). See Chrysler Corp. v. Brown, 99 S. Ct. at 1719-20.
- 265. See the example cited in Chrysler Corp. v. Brown, id., at 1720 n.38.
- 266. See the example cited id., at 1721.
- 267. Id., at 1720.
- 268. 555 F.2d 82 (3d Cir. 1977).
- 269. Id., at 94. See Clement, supra note 203, at 623.
- 270. Id., at 86.
- 271. 42 U.S.C. § 2201(p) (1976).
- 272. 555 F.2d at 89.
- 273. Id.
- 274. 99 S. Ct. at 1719-20.
- 275. 99 S. Ct. at 1722 n.40.
- 276. 20 C.F.R. § 422.435 (1979).
- 277. 604 F.2d 407 (5th Cir. 1979). See also Cedars Nursing & Convalescent Center, Inc. v. Aetna Life & Cas. Ins. Co., 472 F. Supp. 296 (E.D. Pa. 1979) and Brookwood Medical Center, Inc. v. Califano, 470 F. Supp. 1247 (N.D. Ga. 1979).
- 278. 604 F.2d at 409.
- 279. Id., at 410.
- 280. 42 U.S.C. 1306(a) (1976).
- 281. S. REP. NO. 94-1178, 94th Cong., 2d Sess. 25 (1976).

282. See, e.g., Charles River Park "A", Inc. v. HUD, 519 S.2d 935, 941-42 n.7 (D.C. Cir. 1975) and Chrysler Corp. v. Brown, 99 S. Ct. at 1726 n.49.

283. Originally enacted as Act of Jan. 27, 1938, ch. 11, 52 Stat. 8. Interestingly enough, the original language and intent of 15 U.S.C. § 176b, supposedly consolidated into 18 U.S.C. § 1905, is found alive and well at 15 U.S.C. § 176a (1976).

284. Originally enacted as Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223.

285. Originally enacted as Revenue Act of 1916, ch. 463, § 708, 39 Stat. 756.

286. H.R. COMMITTEE ON GOV'T OPERATIONS, COMPTROLLER GENERAL REPORTS TO CONGRESS ON AUDITS ON DEFENSE CONTRACTS App. IC, 89th Cong., 1st Sess. (1965).

287. Cavanagh, The Freedom of Information Act and Government Contracts-- Problems in Protection of Confidential Information, 2 PUB. CONT. L.J. 225, 235 n.18 (1969).

288. Clement, supra note 203, at 606-17 (1977). Mr. Clement's analysis has been endorsed by the House Committee on Government Operations. See H.R. REP. NO. 95-1382, supra note 34, at 58.

289. Babcock, Current and Future Litigation Under Chrysler v. Brown, 435 PAT., T.M. & COPYRIGHT J., Jun. 28, 1979, at D-1, D-3. This memorandum to all agency general counsel is dated June 21, 1979.

290. See Chrysler Corp. v. Brown, 99 S. Ct. at 1717 n.29.

291. 32 C.J.S. Statutes § 271 at 449-51, § 275 at 462, § 276 at 462-67, § 311 at 526-30, § 316 at 548-53, § 385 at 907-08; 73 AM. JUR. 2d Statutes § 142 at 349, § 145 at 351, § 147 at 352, § 150 at 354, § 151 at 355-56, § 155 at 359, § 194 at 392, § 195 at 392, § 199 at 395, § 322 at 469, § 324 at 471, § 325 at 472-73, § 328 at 474, § 330 at 475 (1974).

292. O'Reilly, Government Disclosure of Private Secrets under the Freedom of Information Act, 30 BUS. LAW. 1125, 1135 n.62 (1975).

293. Chrysler Corp. v. Brown, 99 S. Ct. at 1715-17.

294. Id., at 1726 n.49.

295. Id., at 1726. The Third Circuit was well aware of the issue but did not reach it. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1187 n.73 (3d Cir. 1977).

296. Congress responded to the Supreme Court's decision in EPA v. Mink, 410 U.S. 73 (1973), the following year with the 1974 Amendments to the Information Act. (Exemption one was amended.) Congress responded to the Supreme Court's decision in FAA v. Robertson, 422 U.S. 255 (1975), the following year with the 1976 Amendments. (Exemption three was amended.)

297. S. 1437 (H.R. 6869), 95th Cong., 1st Sess. (1978).
298. S. 1437, subch. C, § 1525, 95th Cong., 1st Sess. (1978). Subchapter C is entitled "Offenses Involving Privacy" and section 1525 is entitled "Revealing Private Information Submitted for a Government Purpose."
299. S. REP. NO. 95-605, Part I, supra note 203, at 511.
300. Arthur A. Checchi, food and drug company consultant, quoted in Arnold, Who's Going Fishing in Government Files, JUR. DOCTOR 22 (Apr. 1976).
301. 5 U.S.C. § 552(b)(4) (1976).
302. HEARINGS BEFORE A SUBCOMM. OF THE HOUSE COMM. ON GOV'T OPERATIONS, BUSINESS RECORD EXEMPTION OF THE FREEDOM OF INFORMATION ACT, 95th Cong., 1st Sess. 111 (Oct. 3-4, 1977) (statement of Burt A. Braverman), quoted in H.R. REP. NO. 95-1382, supra note 34, at 5.
303. Graham, Loose Lips Sink Blue Chips, The Washington Post, Dec. 17, 1978, at G1, G3.
304. Id., at G3.
305. See Moskai, Sleuthing the Opposition, INDUS. WEEK, Nov. 21, 1977 for a list of ways to gain information from competitors.
306. Arnold, supra note 300, at 2. Cf. Hinkle, Freedom of Information: How It's Working, DEFENSE 81, Feb. 1981, at 17 (Department of Defense requesters).
307. Claire Nadar, quoted in Corporate Spying Prompts New Look at Trade Secrecy, 199 SCIENCE, Jan. 27, 1978, at 409.
308. See cases collected in H.R. REP. NO. 95-1382, supra note 34, at 7-8.
309. Id., at 9.
310. 1967 MEMORANDUM, supra note 1, at 32.
311. Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 594 (D.P.R. 1967); GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).
312. See Getman v. NLRB, 450 F.2d 670, 673 (D.C. Cir. 1971); Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Consumers Union, Inc. v. VA, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).
313. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974).
314. 4 RESTATEMENT OF TORTS § 757, comment b at 5 (1939).
315. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 474 (1974) and cases collected at Mobay Chemical Corp. v. Costle, 447 F. Supp. 811, 825 (W.D. Mo. 1978).

316. Honeywell Information Sys. v. NASA, No. 76-353 (D.D.C. 1976).
317. UNIFORM TRADE SECRETS PROTECTION ACT § 1(4), proposed by American Bar Ass'n Comm. 402, Subcomm. C, Section of Patent, Trademark & Copyright Law (1971).
318. Consumers Union, Inc. v. VA, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971), quoting Norwegian Nitrogen Products Co. v. United States Tariff Comm'n, 6 F.2d 491, 495 (D.C. Cir. 1925), rev'd on other grounds, 274 U.S. 106 (1927).
319. 475 F. Supp. 338 (D.D.C. 1979).
320. Id., at 339.
321. 15 U.S.C. § 46(f) (1976).
322. 409 F. Supp. 297, 303 (D.D.C. 1976), aff'd, 548 F.2d 977, 979 (D.C. Cir. 1976).
323. 589 F.2d 582, 586 (D.C. Cir. 1978).
324. 475 F. Supp. at 343.
325. RESTATEMENT OF TORTS § 757, at 5 (1939).
326. Norwegian Nitrogen Products Co. v. United States Tariff Comm'n, 6 F.2d 491, 495 (D.C. Cir. 1925), rev'd on other grounds, 274 U.S. 106 (1927).
327. Central Specialties Co. v. Schaefer, 318 F. Supp. 855, 859 (N.D. Ill. 1970).
328. Cudaly Co. v. Am. Labs, Inc., 313 F. Supp. 1339, 1343-45 (D. Neb. 1970).
329. 301 F. Supp. at 801. The definition was drawn from the Norwegian Nitrogen Products case.
330. H.R. REP. NO. 95-1382, supra note 34, at 16. One commentator observes that, "For a federal court considering a trade secrecy exemption claim in a disclosure case, the first inquiry will be to the state law on trade secret status; the forum's law is not preempted by federal patent law, and guides the federal decision under Erie v. Tompkins (T)he Supreme Court has held that common law principles of trade secrecy and those embodied in earlier federal statutes, bar federal agencies from defining trade secrecy contrary to that common law (citing Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974))."
331. 4 RESTATEMENT OF TORTS § 757, comment b, at 6 (1939).
332. Hein, Obtaining Access to Information in the Files of Government Agencies: The Corporate Perspective, 34 BUS. LAW. 993, 999 (1979).
333. DAR § 15-205.35 (1976) (DAC 76-18, Mar. 12, 1979).

334. Prologue to Independent Research and Development Data Sheet, DDC Form 271 (Jan. 1975).

335. Consumers Union, Inc. v. VA, 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

336. DAR § 4-913 (DAC 76-9, Aug. 30, 1977) (emphasis in original).

337. DAR § 3-507.1(a) (1976) (emphasis in original).

338. DAR § 3-507.1(c) (DAC 76-9, Aug. 30, 1977).

339. 35 U.S.C. § 122 (1976). See Sears v. Gottschalk, 502 F.2d 122 (4th Cir. 1974) and Lee Pharmaceuticals v. Kreps, 577 F.2d 610 (9th Cir. 1978).

340. 35 U.S.C. § 102 (1976).

341. 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975).

342. Id., at 244.

343. Id., at 244-45.

344. See the proposed amendment at Note, 17 BOSTON COLL. IND. & COMM. L. REV. 91, 106 (1975).

345. 120 CONG. REC. S9338 (daily ed. May 30, 1974).

346. H.R. REP. NO. 95-1382, supra note 34, at 21.

347. Id., at 22.

348. See O'Reilly, supra note 292, at 1143.

349. S. REP. NO. 813, supra note 4, at 9. See also H.R. REP. NO. 1497, supra note 3, at 10 for a similar list of examples.

350. See, e.g., Smith v. Dravo Corp., 203 F.2d 369 (7th Cir. 1953).

351. See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

352. 4 RESTATEMENT OF TORTS § 757, comment b (1938).

353. Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976)(withheld as to five submitters; reversed and remanded for reconsideration as to two submitters).

354. Pacific Architects & Eng'rs, Inc. v. Renegotiation Bd., 505 F.2d 383 (D.C. Cir. 1974)(remanded for additional evidence).

355. Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975) (remanded for further proceedings).

356. McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974)(withheld).

357. Fisher v. Renegotiation Bd., 355 F. Supp. 1171 (D.C. Cir. 1973) (withheld).

358. Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971)(withheld).

359. Xerox Corp. v. FCC, 41 Ad.L.2d 790 (FCC 1978)(withheld).

360. Honeywell Information System v. NASA, No. 76-353 (D.D.C. 1976) (withheld).

361. Shermco Industries, Inc. v. ir Force, 452 F. Supp. 306 (N.D. Tex. 1978)(released after decision to make award; dicta: withhold prior to award decision), rev'd, No. 78-2499 (5th Cir. Mar. 19, 1980), reprinted in 826 FED. CONT. REP., Apr. 7, 1980, at E-1 (withheld since the court determined it was still the pre-award stage).

362. Audio Technical Services, Ltd. v. Army, No. 78-2260 (D.D.C. Oct. 25, 1979)(withheld).

363. Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975) (component data withheld by agency; remanded for additional evidence on whether bottom line figures by installation location and methods of acquisition, e.g., lease/purchase, may be released).

364. Honeywell Information System v. NASA, No. 76-353 (D.D.C. 1976) (withheld).

365. Petkas v. Staats, 501 F.2d 887 (D.C. Cir. 1974)(reversed and remanded for further proceedings, then settled).

366. Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979)(vacated and remanded).

367. St. Mary's Hospital, Inc. v. Harris, 604 F.2d 407 (5th Cir. 1979) (released).

368. Texas Community Antenna, Inc., 41 Ad.L.2d 420 (FCC 1977)(withheld); Better Cable TV, 41 Ad.L.2d 505 (FCC 1977)(withheld).

369. Mitsubishi v. DOJ, 41 Ad.L.2d 67 (D.C. Cir. 1977)(withheld).

370. Union Oil Co. v. FPC, 542 F.2d 1036(9th Cir. 1976)(withheld); Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975), cert denied, sub nom. Superior Oil v. FPC, 425 U.S. 971 (1976).

371. USS-OCF-W&M, No. 76-1933 (D.D.C. Dec. 9, 1976)(withheld).

372. Stone v. Export-Import Bank, 552 F.2d 132 (5th Cir. 1977)(withheld).

373. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

374. Id., at 682, 687.

375. H.R. REP. NO. 1497, supra note 3, at 10; S. REP. NO. 813, supra note 4, at 9.

376. See Patten & Weinstein, Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations, 29 AD. L. REV. 193, 197 (1977).

377. H.R. REP. NO. 1497, supra note 3, at 10.

378. The so-called "promise of confidentiality" test was employed in *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969). See also *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967).

379. 501 F.2d 887, 889 (D.C. Cir. 1974).

380. S. REP. NO. 813, supra note 4, at 9. See *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970); and *Shapiro & Co. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. 1972).

381. See H.R. REP. NO. 95-1382, supra note 34, at 18.

382. Id.

383. 441 U.S. 281 (1979).

384. *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171 (D. Del. 1976).

385. *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977).

386. *Chrysler Corp. v. Schlesinger*, 611 F.2d 439 (3d Cir. 1979).

387. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

388. Id., at 767.

389. Id., at 768.

390. Id., at 770.

391. Id., at 771.

392. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.10 (1977 Supp.).

393. See *United Technologies Corp. v. Marshall*, 464 F. Supp. 845 (D. Conn. 1979) and English, Protecting the Stakeholder: Defense of the Government Agency's Interests During Reverse FOIA Lawsuits, 31 AD. L. REV. 151, 160 (1979).

394. *Green v. Dep't of Commerce*, 468 F. Supp. 691, 693 (D.D.C. 1979).

395. Muhn, The Freedom of Information Act: Its Impact on the Contractor's Technical Proposal, 13 NAT'L CONT. MGT. J. 34, 40 (1979).

396. Id. (emphasis in original).

397. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d at 768-69.

398. Id.
399. 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 693 (1975).
400. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d at 766.
401. 501 F.2d 887, 889 (D.C. Cir. 1974).
402. 424 F.2d 935 (D.C. Cir. 1970).
403. Id., at 938.
404. Westchester General Hosp. v. HEW, 464 F. Supp. 236 (M.D. Fla. 1979).
405. Id., at 245-46.
406. 547 F.2d 673 (D.C. Cir. 1976).
407. Id., at 684.
408. Patten & Weinstein, supra note 376, at 199-200.
409. Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 683 (D.C. Cir. 1976).
410. See Patten & Weinstein, supra note 376, at 201 and English, supra note 393, at 160.
411. See Gulf & Western Indus., Inc. v. United States, No. 79-1646, slip op. at 7 (D.C. Cir. 1979); H.R. REP. NO. 95-1382, supra note 34, at 22; and Hein, supra note 332, at 999.
412. Fettig, Office of Federal Procurement Policy, Policy Letter No. 78-3, Subject: Requests for Disclosure of Contractor-Supplied Information Obtained in the Course of a Procurement (Mar. 30, 1978), reprinted in Defense Acquisition Circular (DAC) 76-16 (Aug. 1, 1978).
413. Id.
414. H.R. REP. NO. 95-1382, supra note 34, at 46 n.155.
415. Fettig, OFPP Policy Letter No. 78-3, supra note 412.
416. 32 C.F.R. § 286.4(c)(4)(i-v)(1978), reprinted as DAR app. L (1976). The same examples are preserved in the latest DOD guidance. See 45 Fed. Reg. 80,507 (Dec. 5, 1980)(to be codified in 32 C.F.R. § 286.31(a) No. 4).
417. DAR § 1-329.3(c)(4)b (1976). The Freedom of Information chapter of the Federal Acquisition Regulation (FAR) has been circulated for comment. The FAR has been proposed as the successor to the Defense Acquisition Regulation. With respect to exemption four, the FAR omits the specific examples provided by DAR § 1-329. See proposed 48 C.F.R. § 24.205(b)(4).
418. See DAR §§ 3-507.1 (1976), 3-507.2 (DAC 76-9, Aug. 30, 1977), and 4-913 (DAC 76-9, Aug. 30, 1977).

419. DAR § 3-508.3(a) (1976).
420. DAR § 1-1004.1(a) (DAC 76-14, Mar. 13, 1978).
421. Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1211 (4th Cir. 1976), cert. denied, sub nom. Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977)(emphasis in original).
422. S. REP. NO. 93-854, 93rd Cong., 2d Sess. 6 (1974)(emphasis in original). See also H.R. REP. NO. 93-876, 83rd Cong., 2d Sess. 4 (1974).
423. 99 S. Ct. 1705 (1979).
424. Id., at 1712-14.
425. Id., at 1725-26.
426. 401 U.S. 402 (1971).
427. Id., at 411.
428. Mr. Justice Douglas took no part in the decision. Id., at 421.
429. 5 U.S.C. § 706(2)(A) (1976).
430. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416-17 (1971).
431. 404 F. Supp. 352, 369 (D. Del. 1975), aff'd, No. 78-1328 (3d Cir. 1979).
432. Id., at 360.
433. Id., at 363.
434. 534 F.2d 627 (5th Cir. 1976).
435. 519 F.2d 935 (D.C. Cir. 1975).
436. 534 F.2d at 629.
437. Id.
438. Continental Oil Co. v. FPC, 519 F.2d 31, 36 (5th Cir. 1975), cert. denied, sub nom. Superior Oil v. FPC, 425 U.S. 971 (1976).
439. Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976). St. Mary's Hosp., Inc. v. Califano, 462 F. Supp. 315, 318-20 (S.D. Fla. 1978) is an example which satisfies the three Pennzoil criteria. No abuse of discretion was found in the agency determination to release Medicare cost reports.
440. 519 F.2d 935 (D.C. Cir. 1975).
441. Id., at 939.

442. Id., at 942.
443. Id., at 943.
444. A written determination includes a ruling, determination letter, or technical advice memorandum. 26 U.S.C. § 6110(b)(1) (1976).
445. A background file document includes the request for a written determination, written material submitted in support of a request, and other communications associated with written determinations. 26 U.S.C. § 6110(b)(2) (1976).
446. 26 U.S.C. § 6110(c) (1976).
447. 26 U.S.C. § 6110(c)(4) (1976).
448. 26 U.S.C. § 6110(i) (1976).
449. 99 S. Ct. 1705 (1979).
450. 404 F. Supp. 352 (D. Del. 1975), aff'd, No. 78-1328 (3d Cir. 1979).
451. See, e.g., McCoy v. Weinberger, 386 F. Supp. 504, 507 (W.D. Ky. 1974).
452. See 41 C.F.R. §§ 60-1.3, 60-1.7, 60-40.2(a), 60-40.2(b)(1), 60-40.3, 60-40.4 (1977) and Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1710 (1979).
453. 41 C.F.R. § 60-40.2 (1977).
454. 21 C.F.R. § 20.61(c) (1977).
455. 21 C.F.R. § 20.100 et seq. (1977).
456. 21 C.F.R. § 71.15 (1977).
457. See test supra notes 417-20.
458. 32 C.F.R. § 286.3(a),(b) (1978), reprinted as DAR app. L (1976). See also DAR 1-329.2(a),(b) (DAC 76-5, Oct. 15, 1976). This policy is retained in the latest DOD guidance. See 45 Fed. Reg. 80,504 (Dec. 5, 1980)(to be codified in 32 C.F.R. § 286.14(e)).
459. Att'y Gen. Griffin Bell, Letter to Heads of All Federal Departments and Agencies - Re Freedom of Information Act, reprinted in 123 CONG. REC. S7763 (daily ed. May 17, 1977)(remarks of Sen. Kennedy).
460. Id.
461. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1724 (1979).
462. Id., at 1717-18.
463. Id., at 1717-24.
464. 42 U.S.C. § 1306(a) (1976).

465. St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407 (5th Cir. 1978).
466. 5 U.S.C. § 706(2)(A) (1976).
467. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1720 (1979).
468. See id., at 1721 and St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 410 (5th Cir. 1979).
469. Id., at 1719.
470. See, e.g., Chevron Chem. Co. v. Castle, 443 F. Supp. 1024, 1031-32 (N.D. Cal. 1978), wherein this point is applied to a trade secret claim.
471. See cases collected at Connolly & Fox, Employer Rights and Access to Documents Under the Freedom of Information Act, 46 FORDHAM L. REV. 203, 224 (1977).
472. See Femino & Smail, The Freedom of Information Act and Federal Acquisition: The Proper Balancing of Competing Interests, 12 NAT'L CONT. MGT. Q. J. 1, 6-9 (1978).
473. See, e.g., Clement, supra note 203, at 641; H.R. REP. NO. 95-1382, supra note 34, at 12, 23; and cases cited in both sources.
474. 5 U.S.C. § 552(a)(3) (1976).
475. H.R. REP. NO. 95-1382, supra note 34, at 12.
476. 502 F.2d 133, 136 (3d Cir. 1974).
477. Id., at 137.
478. 519 F.2d 935, 943 (D.C. Cir. 1975).
479. Id.
480. 501 F.2d 877 (D.C. Cir. 1974).
481. 5 U.S.C. § 552(b) (1976).
482. See GTE Sylvania, Inc. v. CPSC, 404 F. Supp. 352, 374 n.93 (D. Del. 1975) (television safety data); Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 943 (D.C. Cir. 1975) (financial reports requested by tax assessor); Pennzoil Co. v. FPC, 534 F.2d 627, 632 (5th Cir. 1976) (natural gas reserves data).
483. See Charles River Park "A", Inc. v. HUD, id., at 943 n.10.
484. 5 U.S.C. § 701 et seq. (1976).
485. 5 U.S.C. § 552(a)(4)(E) (1976).
486. 5 U.S.C. § 552(a)(4)(F) (1976).
487. 5 U.S.C. § 552(a)(4)(G) (1976).

488. See, e.g., *Shermco Industries, Inc. v. Air Force*, 452 F. Supp. 306, (N.D. Tex. 1978), rev'd, No. 78-2499 (5th Cir. Mar. 19, 1980), reprinted in 826 FED. CONT. REP., Apr. 7, 1980, at E-1; *M.C.A, Inc. v. IRS*, 434 F. Supp. 212 (C.D. Cal. 1977); *Campbell v. Civil Service Comm'n*, 539 F.2d 58 (10th Cir. 1976); *Goldstein v. Levi*, 415 F. Supp. 303 (D.D.C. 1976); *Kaye v. Burns*, 411 F. Supp. 897 (S.D.N.Y. 1976).

489. 5 U.S.C. § 552(a)(4)(F) (1976). See 5 C.F.R. § 294.1201-07 (1978) for the implementing regulations.

490. 5 U.S.C. § 552(b) (1976).

491. See, e.g., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT 23 (1975).

492. 5 U.S.C. § 701 et seq. (1976).

493. 18 U.S.C. § 1905 (1976).

494. 26 U.S.C. § 6110 (1976).

495. See, generally, 4 RESTATEMENT OF TORTS § 757 (1939).

496. 194 F.2d 145 (D.C. Cir. 1951).

497. 28 U.S.C. §§ 1346(b), 2680h (1976).

498. 28 U.S.C. § 1491 (1976).

499. Contract Disputes Act of 1978, Pub. L. 95-563, § 8d (to be codified in 41 U.S.C. § 607).

500. DAR § 7-104.9(a) (DAC 76-22, Feb. 22, 1980).

501. See text at supra notes 336-37.

502. 161 Ct. Cl. 369 (1963).

503. *Padbloc Co. v. United States*, 180 Ct. Cl. 1298 (1967).

504. R. NASH & J. LASKEN, PATENTS AND TECHNICAL DATA 168-69 (Geo. Wash. U. Gov't Cont. Monograph No. 10, 1967).

505. See text at supra notes 336-37.

506. DAR § 3-507.1(c) (DAC 76-9, Aug. 30, 1977).

507. 501 F.2d 887 (D.C. Cir. 1974).

508. See text at supra notes 336-37.

509. *Westinghouse Elec. Corp. v. Nuclear Regulatory Comm'n*, 555 F.2d 82, 95 (3d Cir. 1977).

510. *Chrysler Corp. v. Schlesinger*, 555 F.2d 1172, 1193 (3d Cir. 1977).

511. No. 77-1860 (D.N.J. Oct. 18, 1978).
512. See H.R. REP. NO. 95-1382, supra note 34, at 35 n.105.
513. See Patten & Weinstein, supra note 376, at 202-203; H.R. REP. NO. 95-1382, supra note 34, at 25; and O'Reilly, supra note 292, at 1134.
514. See Wachtell, Disclosure to Third Parties of Information Filed with Government Agencies: Preventing Disclosure to Third Parties, 34 BUS. LAW. 1049, 1053 (1979).
515. 5 U.S.C. § 552(b)(5) (1976).
516. Mead Data Central, Inc. v. Air Force, 566 F.2d 242, 252 n.14 (D.C. Cir. 1977).
517. FOMC v. Brown, 99 S. Ct. 2800, 2813 (1979) (citations omitted); EPA v. Mink, 410 U.S. 73, 86 (1973).
518. EPA v. Mink, 410 U.S. at 76 n.3 & 85 n.11.
519. 157 F. Supp. 939, 946, 141 Ct. Cl. 38, 48 (1958).
520. S. REP. NO. 813, supra note 4, at 9, quoted at EPA v. Mink, 410 U.S. at 87 (1973).
521. 421 U.S. 132 (1975).
522. 421 U.S. 168 (1975).
523. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 137 (1975).
524. Id., at 148.
525. Id., at 151.
526. Id., at 153, quoting Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761, 797 (1967).
527. Id., at 160.
528. 1 K. DAVIS, supra note 33, § 5.35 at 407-14.
529. 5 U.S.C. § 552(a)(2)(B) (1976).
530. 1 K. DAVIS, supra note 33, at 411.
531. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975).
532. 421 U.S. 168 (1975).
533. Id., at 179.
534. 5 U.S.C. § 552(a)(2)(A) (1976).

535. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 182 (1975).

536. *Id.*

537. *Id.*, at 183.

538. *Id.*, at 184-85.

539. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975).

540. 5 U.S.C. § 552(a)(2)(B) (1976).

541. *Cf.* 1 K. DAVIS, *supra* note 33, § 5:36 at 414-16.

542. Saloschin, *When to Assert the Deliberative Privilege Under FOIA Exemption 5*, 38 FED. B.J. 148, 149 (1979).

543. DAR app. L, at VI(C)(5)(a)(4) (1976), also found at 45 Fed. Reg. 80,507 (Dec. 5, 1980) (to be codified in 32 C.F.R. § 286.31(a)No.5(1)(iii)).

544. DAR § 1-329.3(c)(5)b (1976).

545. No. 78-2260 (D.D.C. Oct. 25, 1979), *reprinted in* 814 FED. CONT. REP. Jan. 14, 1980, at A-3.

546. *Id.*

547. DAR § 3-510.4(c) (1976). *See also* DAR § 2-408.1 (1976).

548. No. 78-2499 (5th Cir. Mar. 19, 1980), *reprinted in* 826 FED. CONT. REP., Apr. 7, 1980, at E-1, *reversing* 452 F. Supp. 306 (N.D. Tex. 1978).

549. 452 F. Supp. at 312.

550. 826 FED. CONT. REP., Apr. 7, 1980, at E-3 n.9.

551. 452 F. Supp. at 322.

552. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

553. 826 FED. CONT. REP., Apr. 7, 1980, at E-4.

554. 123 CONG. REC. S7763 (daily ed. May 17, 1977)(remarks of Sen. Kennedy).

555. *See* Saloschin, *supra* note 542, at 150 *and* H.R. REP. NO. 95-1382, *supra* note 34, at 23 nn.60,61.

556. 123 CONG. REC. S7763 (daily ed. May 17, 1977)(remarks of Sen. Kennedy).

557. *FOMC v. Merrill*, 99 S. Ct. 2800, 2812 (1979).

558. Saloschin, *supra* note 542, at 151-53.

559. DAR § 1-329.3(c)(5)c (1976). The most recent characterization is found at 45 FED. REG. 80,507 (Dec. 5, 1980) (to be codified in 32 C.F.R. § 286.31(a) No. 5(1)(iv)): "The following types of records may be withheld in whole or in part from public disclosure unless otherwise prescribed by law. . . . Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions."

560. See, e.g., 1967 MEMORANDUM, supra note 1, at 34.

561. See, e.g., FOMC v. Merrill, 99 S. Ct. 2800, 2812 (1979).

562. See, e.g., sources cited at supra note 559.

563. 99 S. Ct. 2800 (1979).

564. Id., at 2803-2806.

565. Id., at 2806, 2814.

566. Id., at 2807.

567. Id.

568. FED. R. CIV. P. 26(c)(7).

569. HEARINGS ON S. 1160 BEFORE THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess. 418 (1965).

570. Id., at 480.

571. HEARINGS ON H.R. 5012 BEFORE A SUBCOMM. OF THE HOUSE COMM. ON GOV'T OPERATIONS, 89th Cong., 1st Sess. 224 (1965).

572. Id., at 49.

573. See FOMC v. Merrill, 99 S. Ct. at 2811 n.20.

574. Id.

575. H.R. REP. NO. 1497, supra note 3, at 10.

576. See text at supra note 387.

577. FOMC v. Merrill, 99 S. Ct. at 2814-15 n.1.

578. See text at supra note 92.

579. FOMC v. Merrill, 99 S. Ct. at 2812.

580. 1967 MEMORANDUM, supra note 1, at 34 (emphasis added).

581. 5 U.S.C. § 552(b)(4) (1976).

582. See Soucie v. David, 448 F.2d 1067 n.47 (D.C. Cir. 1971); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970); Fisher v. Renegotiation Bd., 355 F. Supp. 1171, 1174 (D.C. Cir. 1973); Consumers Union, Inc. v. VA, 301 F. Supp. 796, 802-803 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971); Benson v. GSA, 289 F. Supp. 590, 594 (W.D. Wash. 1968), aff'd, 415 F.2d 878 (9th Cir. 1969). Contra, Brockway v. Air Force, 518 F.2d 1184, 1187 (8th Cir. 1975).

583. FOMC v. Merrill, 99 S. Ct. at 2812.

584. FED. R. CIV. P. 26(c)(7).

585. FOMC v. Merrill, 99 S. Ct. at 2812.

586. See, e.g., J. O'REILLY, supra note 1, § 14.10 at 14-39.

587. 45 FED. REG. 80,507 (Dec. 5, 1980) (to be codified in 32 C.F.R. § 286.31(a)NO.5(1)(v)). This language does not appear in DOD Directive 5400.7, supra note 90, para. VI(C)(5)(a), reprinted as DAR app. L (1976); or in 32 C.F.R. § 286.4(c)(5)(i) (1978); or even in 45 FED. REG. 28,329 (Apr. 29, 1980) (originally to have been codified at 32 C.F.R. § 286.5 Enclosure 5, No. 5(a) but superceded by 45 FED. REG. 80,507 (Dec. 5, 1980)).

588. See text at supra notes 89-125.

589. H. RELYEA, THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT: A BRIEF OVERVIEW OF EXECUTIVE BRANCH ANNUAL REPORTS FOR 1977 24 (Cong. Research Service Nov. 15, 1978).

590. Id., at 52.

591. Id., at 48.

592. U.S. DEP'T OF JUSTICE, FOIA UPDATE 1 (wtr. 1980).

593. Id.

594. H.RELYEA, supra note 589, at 51 (\$103,323).

595. 5 U.S.C. 552(a)(4)(A) (1976).

596. "... (W)e have expanded since 1974 our full-time staff handling Freedom of Information and Privacy Act (FOIPA) work from less than twenty people to more than 300 and have expanded over 23 million dollars from 1974 through the end of 1978." Breeson, FOIA and Privacy Act Implementation by the FBI, 38 FED. B.J. 154 (1979).

597. 45 FED. REG. 28,327, Apr. 29, 1980 and more recently, 45 FED. REG. 80,513, Dec. 5, 1980 (to be codified in 32 C.F.R. § 286.60(b)(2)).

598. 41 C.F.R. § 105-60.402-1 (1979).

599. 41 C.F.R. § 105-60.403 (1979).

600. 41 C.F.R. § 105-60.404 (1979).

- 601. 14 C.F.R. § 1206.40 (1980).
- 602. 14 C.F.R. § 1206.502 (1980).
- 603. 14 C.F.R. § 1206.500 (1980).
- 604. 32 C.F.R. § 701.7 (1979).
- 605. 32 C.F.R. § 701.9 (1979).
- 606. 32 C.F.R. § 701.9(c)(2)(ii) (1979).
- 607. 32 C.F.R. § 518.3(a)(2) (1979).
- 608. 32 C.F.R. § 518.9(b) (1979).
- 609. 32 C.F.R. § 518.10(a)(3) (1979).
- 610. AIR FORCE MAGAZINE, May 1980 (almanac issue).
- 611. 32 C.F.R. § 806.27(a)(2) (1979).
- 612. Id.
- 613. 32 C.F.R. § 806.31(a) (1979).
- 614. 32 C.F.R. §§ 806.7(a), 806.57 (1979).
- 615. For purposes of the Information Act, the Department of Defense includes the Office of the Secretary of Defense; Organization of the Joint Chiefs of Staff; Departments of the Army, Navy, and Air Force; Defense Communications Agency; Defense Contract Audit Agency; Defense Intelligence Agency; Defense Investigative Service; Defense Logistics Agency; Defense Mapping Agency; Defense Nuclear Agency; and National Security Agency. 45 FED. REG. 80,521 (Dec. 5, 1980).
- 616. DEP'T OF DEFENSE, SUMMARY OF REPORT TO THE CONGRESS, FREEDOM OF INFORMATION 1 (CY 1978).
- 617. Id.
- 618. Id., 1, 8; H. RELYEA, THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT: A BRIEF OVERVIEW OF THE EXECUTIVE BRANCH ANNUAL REPORTS FOR 1975 (Sep. 2, 1976), 1976 (Oct. 17, 1977), 1977 (Nov. 15, 1978)(Cong. Research Service).
- 619. DEP'T OF DEFENSE, SUMMARY OF REPORT TO CONGRESS, FREEDOM OF INFORMATION 4 (CY 1978).
- 620. 5 U.S.C. § 552(d)(3) (1976).
- 621. 45 FED. REG. 80,511 (Dec. 5, 1980) (to be codified in 32 C.F.R. § 286.5(a)). The Air Force regulation, at 32 C.F.R. § 806.57(a) (1980), indicates that appeal will be within 45 days of denial. In light of the explicit DOD language the Air Force rule should probably be interpreted as meaning "within 45 days of notice of denial."

622. 32 C.F.R. § 806.57(c) (1980).

623. Department of Justice regulations indicate that agencies intending to deny requests "should consult" with the Committee "to the fullest extent practicable, before litigation ensues." 28 C.F.R. § 0.29a(b) (1979). The litigation itself will be handled by the Civil Division of the Department of Justice or by a U.S. Attorney's Office.

624. 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

625. See text at supra notes 509-12.

626. 397 U.S. 254 (1970).

627. Id., at 267-71. See K. DAVIS, ADMINISTRATIVE LAW TEXT 169-70 (1972). Another characterization of the elements of procedural due process includes: (1) an unbiased tribunal, (2) notice of the proposed action, (3) an opportunity to present reasons why the proposed action should not be taken, (4) the right to call witnesses, (5) the right to know the opposing evidence, (6) the right to have a decision based only on the evidence presented, (7) counsel, (8) compilation of a record, (9) a statement of reasons, (10) public attendance, and (11) judicial review. Friendly, Some Kind of Hearing, 123 U. PA. L. REV. 1267, 1279-95 (1975).

628. 408 U.S. 471, 481 (1972). See also Hahn, Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation (Part II), 31 AD. L. REV. 31, 65-66 (1979).

629. See, e.g., H.R. REP. NO. 95-1382, supra note 34, at 27; Clement, supra note 203, at 634 n.222; English, supra note 393, at 170-71; and Patten & Weinstein, supra note 376, at 204 n.27.

630. 401 F. Supp. 444 (D.D.C. 1975), modified, 411 F. Supp. 576 (D.D.C. 1976).

631. 21 C.F.R. §§ 4.44-4.46 (1975).

632. 411 F. Supp. at 578-79.

633. 412 F. Supp. 171, 178-79 (D. Del. 1976).

634. 41 C.F.R. § 60-60.4(d).

635. 32 C.F.R. § 1285.7(b)(7).

636. 412 F. Supp. at 178-79.

637. Id.

638. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1193 (3d Cir. 1977).

639. 464 F. Supp. 845 (D. Conn. 1979).

640. Id., at 855 (emphasis added). See cases in accord cited.

641. 424 U.S. 319 (1976).

642. Id., at 335.

643. Id.

644. FOIA UPDATE, supra note 592, at 4.

645. Fettig, OFPP Policy Letter No. 78-3, supra note 412.

646. 45 FED REG. 80,511 (Dec. 5, 1980). This is the latest publication of DOD Directive 5400.7, Availability to the Public of Department of Defense Information, which is published at Appendix L to the Defense Acquisition Regulation. Part 24 of the proposed Federal Acquisition Regulation, entitled Protection of Privacy and Freedom of Information, contains essentially the same guidance for private business data (proposed 48 C.F.R. § 24.204(b)). See also the Air Force Systems Command Supplement 1 to Air Force Regulation 12-30, Disclosure of Air Force Records to the Public, at para. 18.3a (Jul. 26, 1977) for similar guidance on private business data.

647. 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

648. Id., at 823-25.

649. Id., at 825-26.

650. Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979). See also Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973), cert. denied, sub nom. Rosen v. Vaughn, 415 U.S. 977 (1974).

651. 484 F.2d at 825.

652. Mead Data Central, Inc. v. Air Force, 566 F.2d 242, 248-249, 251 (D.C. Cir. 1977).

653. Goland & Skidmore v. CIA, No. 76-1800, slip op. at 22-23 (D.C. Cir. 1978).

654. 5 U.S.C. § 552(a)(4)(B) (1976).

655. Vaughn v. Rosen, 484 F.2d 820, 828 (D.C. Cir. 1973).

656. 484 F.2d 1086 (D.C. Cir. 1973), cert. denied, sub. nom. Rosen v. Vaughn, 415 U.S. 977 (1974).

657. Id., at 1093.

658. See a sample Vaughn motion, a supporting memorandum, and resulting court orders at C. MARWICK (ed.), LITIGATION UNDER THE AMENDED FEDERAL FREEDOM OF INFORMATION ACT app. 43, 45, 54, 55, 59 (4th ed. 1978).

659. S. REP. NO. 93-854, 93d Cong., 2d Sess. 15 (1974).

660. 484 F.2d at 828.

661. 566 F.2d 242 (D.C. Cir. 1977).
662. Id., at 251.
663. Id. See also Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 947 (D.C. Cir. 1979).
664. Coastal States Gas Corp. v. DOE, No. 79-197 (D. Del. 1980). See NAT'L L.J., Sep. 1, 1980, at 6.
665. See J. O'REILLY, supra note 1, § 7.03 at 7-14, 7-15.
666. U.S. Air Force, Litigation Letter No. 6: Assembling the FOIA File/ Processing the Request for Procurement Records para. 3, at 2 (HQ USAF/JACL, Oct. 26, 1976).
667. Mead Data Central, Inc. v. Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977).
668. 5 U.S.C. § 706(2)(A) (1976). See Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1726 (1979).
669. English, supra note 393, at 172-73.
670. FOIA UPDATE, supra note 592, at 5.
671. 5 U.S.C. § 552(a)(6)(A)(i) (1976).
672. For a contrary view, see Campbell, Reverse Freedom of Information Act Litigation: The Need for Congressional Action, 67 GEO. L.J. 103, 119-21 (1978); Clement, supra note 203, at 636; and H.R. REP. NO. 95-1382, supra note 34, at 52.
673. For a concurring view, see Clement, id., at 636-37 and H.R. REP. NO. 95-1382, id., at 50-52.
674. For a concurring view, see Clement, id., at 637 and H.R. REP. NO. 95-1382, id., at 52.
675. H.R. REP. NO. 95-1382, supra note 34, at 53.
676. Act of Nov. 21, 1974, Pub. L. No. 93-502, amending 5 U.S.C. § 552 (1970) (effective Feb. 19, 1975).
677. JOINT COMM. PRINT, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502), 94th Cong., 1st Sess. 484 (1975), quoted in Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 611 n.11 (D.C. Cir. 1976).
678. Id.
679. JOINT COMM. PRINT, supra note 677, at 438-39, quoted at 547 F.2d at 611 n.11.
680. 5 U.S.C. § 552(a)(6) (1976).

681. See text beginning at supra note 610.
682. 5 U.S.C. § 552(a)(6)(A)(i) (1976).
683. 32 C.F.R. § 806.33(a)(1) (1980).
684. 32 C.F.R. § 806.41(b) (1980).
685. 5 U.S.C. § 552(a)(6)(B)(iii) (1976).
686. 5 U.S.C. § 552(a)(6)(A)(ii) (1976).
687. 32 C.F.R. § 806.57(d) (1980).
688. 5 U.S.C. § 552(a)(6)(B) (1976).
689. H.R. REP. NO. 95-1382, supra note 34, at 52.
690. ATT'Y GENERAL, PRELIMINARY GUIDANCE CONCERNING THE 1974 FREEDOM OF INFORMATION ACT AMENDMENTS, P.L. 93-502, ENACTED NOV. 21, 1974 (Dec. 11, 1974), reprinted in U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT app. III-B at 4 (Feb. 1975).
691. 45 FED. REG. 80,512 (Dec. 5, 1980).
692. 5 U.S.C. § 552(a)(6)(A)(i) (1976).
693. Preliminary Guidance, supra note 690, III-B at 6.
694. See, e.g., 45 FED. REG. 80,511 (Dec. 5, 1980)(to be codified in 32 C.F.R. § 286.52(d)(2)) (Department of Defense); 32 C.F.R. § 806.57(a)(1) (1980) (Air Force).
695. See, e.g., 45 FED. REG. 80,511 (Dec. 5, 1980)(to be codified in 32 C.F.R. § 286.51(f)(3)) (Department of Defense).
696. Id. (to be codified in 32 C.F.R. § 286.52(c)).
697. Shermco Industires, Inc. v. Air Force, 452 F. Supp. 306, 316 (N.D. Tex. 1978), rev'd on other grounds, No. 78-2499 (5th Cir. Mar. 19, 1980), reprinted in 826 FED. CONT. REP., Apr. 7, 1980, at E-1.
698. 5 U.S.C. § 552(a)(6)(C) (1976).
699. 547 F.2d 605 (D.C. Cir. 1976).
700. Id., at 608.
701. Id., at 612.
702. Id.
703. Id., at 616.
704. Id., at 613 n.15.

705. See H.R. REP. NO. 95-1382, supra note 34, at 53; Clement, supra note at 203, at 636; FOIA UPDATE; supra note 592, at 5; Preliminary Guidance, supra note 690, at 4-5.

706. Comp. Gen. B-173761, Government Field Offices Should Better Implement The Freedom of Information Act 29 (LCD 78-120, Jul. 25, 1978).

707. Id.

708. Id., at 31.

709. See, e.g., 32 C.F.R. § 806.57(d)(1) (1980) (Air Force notice of right to judicial review). If the denial is based on a security classification, the requester will also be advised of the option to seek declassification of the material through the Interagency Classification Review Committee. 32 C.F.R. § 806.57(d)(3) (1980).

710. 5 U.S.C. § 552(a)(4)(B) (1976).

711. See, e.g., Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 939 (D.C. Cir. 1975) (jurisdiction under the APA). Section 10(a) of the APA, 5 U.S.C. § 702 (1976), provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

712. See, e.g., Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1209-14 (4th Cir. 1976) (jurisdiction under 28 U.S.C. § 1331), cert. denied, 431 U.S. 924 (1977).

713. See, e.g., Burroughs Corp. v. Schlesinger, 403 F. Supp. 633, 634 (E.D. Va. 1975) (jurisdiction under the APA or 28 U.S.C. § 1331).

714. 430 U.S. 99, 105 (1977).

715. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721, codified at 28 U.S.C. § 1331.

716. 430 U.S. at 105.

717. See, e.g., Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1202 (7th Cir. 1978) and Planning Research Corp. v. FPC, 555 F.2d 970, 977 (D.C. Cir. 1977).

718. 99 S. Ct. 1705, 1725 n.47 (1979). See also H.R. REP. NO. 95-1382, supra note 34, at 55-56; Campbell, supra note 672, at 160-67; Clement, supra note 203, at 627-28; and Connolly & Fox, supra note 471, at 218-19.

719. 5 U.S.C. § 552(a)(4)(B) (1976).

720. AMENDING THE FREEDOM OF INFORMATION ACT, S. REP. NO. 93-854, 93d Cong., 2d Sess. 12-13 (1974).

721. 28 U.S.C. s 1391(b) (1976).

722. 28 U.S.C. § 1391(e) (1976), as amended by Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721.

723. The thirteenth manufacturer, Teledyne Mid-America Corp., filed suit but it was voluntarily dismissed. GTE Sylvania, Inc. v. Consumers Union, 48 U.S.L.W. 4293 n.1 (Mar. 19, 1980).

724. 15 U.S.C. § 2051, et seq. (1970).

725. 15 U.S.C. § 2076(b)(3) (1970).

726. These facts are extracted from GTE Sylvania, Inc. v. CPSC, 404 F. Supp. 352 (D. Del. 1975) and GTE Sylvania, Inc. v. Consumers Union, 48 U.S.L.W. 4293 (Mar. 19, 1980).

727. Id., 48 U.S.L.W. 4293 n.1.

728. GTE Sylvania, Inc. v. CPSC, 404 F. Supp. 352 (D. Del. 1975).

729. Consumers Union v. CPSC, 400 F. Supp. 848 (D.D.C. 1975).

730. 561 F.2d 349 (D.C. Cir. 1977).

731. GTE Sylvania, Inc. v. CPSC, 443 F. Supp. 1152 (D. Del. 1977).

732. 434 U.S. 1030 (1978).

733. Consumers Union v. CPSC, 590 F.2d 1209, 1217 (D.C. Cir. 1978).

734. Id.

735. Id., at 1219.

736. Id., at 1223.

737. GTE Sylvania, Inc. v. Consumers Union, 48 U.S.L.W. 4293, 4296 (Mar. 19, 1980).

738. Id., at 4295 (citations omitted).

739. Id., at 4295-96.

740. 443 F. Supp. 1152 (D. Del. 1977).

741. 598 F.2d 790 (3d Cir. 1979).

742. CPSC v. GTE Sylvania, Inc., 48 U.S.L.W. 4658 (Jun. 9, 1980).

743. Id., at 4659. See 15 U.S.C. § 2055(b)(1) (1976).

744. FED. R. CIV. P. 24(a)(2). If this test cannot be met, intervention may nevertheless be permitted by a court under FED. R. CIV. P. 24(b): "(2) (W)hen an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication

of the rights of the original parties."

745. GTE Sylvania, Inc. v. Consumers Union, 48 U.S.L.W. 4293 (Mar. 19, 1980).

746. Consumers Union v. CPSC, 590 F.2d 1209, 1219 n.50 (D.C. Cir. 1978).

747. 355 F. Supp. 1171 (D.D.C. 1973). See also Campbell, supra note 672, at 167-70.

748. Consumers Union v. CPSC, 590 F.2d 1209, 1220 (D.C. Cir. 1978).

749. FED. R. CIV. P. 19(a).

750. FED. R. CIV. P. 20(a).

751. 28 U.S.C. § 1391(e) (1976), as amended by Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721.

752. 28 U.S.C. § 1391(b) (1976).

753. See Consumers Union v. CPSC, 590 F.2d 1209, 1220 n.51 (D.C. Cir. 1978) and Campbell, supra note 672, at 190.

754. FED. R. CIV. P. 19, 20.

755. 5 U.S.C. § 552(a)(4)(B) (1976).

756. 28 U.S.C. § 1331(a) (1976), as amended by Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721.

757. Id.

758. United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966).

759. See Aldinger v. Howard, 427 U.S. 1, 18 (1976) and Owen Equip. & Erection Co. v. Kroger, 98 S. Ct. 2396, 2402 (1978).

760. Campbell, supra note 672, at 174-76.

761. Consumers Union v. CPSC, 590 F.2d 1209, 1219 n.50 (D.C. Cir. 1978), citing Metropolitan Life Ins. Co. v. Uery, 426 F. Supp. 150, 155 (D.D.C. 1976).

762. FED. R. CIV. P. 42(a).

763. GTE Sylvania, Inc. v. Consumers Union, 48 U.S.L.W. 4293 n.1 (Mar. 19, 1980).

764. 28 U.S.C. § 1404(a) (1976).

765. FED. R. CIV. P. 19(a).

766. FED. R. CIV. P. 19(b).

767. Consumers Union v. CPSC, 590 F.2d 1209, 1221 (D.C. Cir. 1978).

- 768. Patten & Weinstein, supra note 376, at 207.
- 769. See Consumers Union v. CPSC, 590 F.2d 1209, 1217 (D.C. Cir. 1978).
- 770. 402 F. Supp. 1342 (D.D.C. 1975).
- 771. General Motors Corp. v. Schlesinger, No. 195-74-A (E.D. Va., filed Apr. 10, 1974), cited in id., at 1344 n.7.
- 772. Id., at 1344-45.
- 773. Id., at 1347.
- 774. Consumers Union v. CPSC, 590 F.2d 1209, 1217-18 (D.C. Cir. 1978).
- 775. Id., at 1218 n.42.
- 776. Id., at 1223.
- 777. H.R. REP. NO. 95-1382, supra note 34, at 65.
- 778. Id.
- 779. Morrison, supra note 25, at 990-91. Mr. Morrison's firm is the Public Citizen Litigation Group of Washington, D.C. It is interesting to note that some submitters' attorneys have argued for making submitters indispensable parties to direct-FOIA suits: "The practical effect of making the submitter of business data an indispensable party to any suit seeking disclosure under the FOIA would be to greatly diminish the potential for industrial espionage which the Act has created. A company will be less likely to bring a FOIA disclosure action for the purpose of "spying" on its competitors if its opponent will be the owner of the requested business records rather than a possibly disinterested government intermediary." Patten & Weinstein, supra note 376, at 207. Thus, submitters also have an interest in litigating in the same forum with requester, though the submitter's rationale cited would not be applicable to public interest group requesters.
- 780. 5 U.S.C. § 552(a)(4)(B) (1976).
- 781. 18 U.S.C. § 1905 (1976).
- 782. 5 U.S.C. § 706 (1976).
- 783. See, e.g., H.R. REP. NO. 95-1382, supra note 34, at 56-63; Campbell, supra note 672, at 130-56; Clement, supra note 203, at 591-633.
- 784. 99 S. Ct. 1705 (1979).
- 785. Id., at 1710.
- 786. Id., at 1711.
- 787. Id.

788. Id., at 1713 n.14, citing the Privacy Act of 1974, 5 U.S.C. § 552a and 49 U.S.C. § 1357.

789. Id., at 1714.

790. Id., at 1725.

791. Id.

792. 5 U.S.C. § 702 (1976).

793. 542 F.2d 1190, 1213 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977).

794. Id., at 1215 (citations omitted).

795. 519 F.2d 935 (D.C. Cir. 1975).

796. Id., at 940 n.4.

797. Id., at 941-42.

798. 28 U.S.C. § 2201 (1976), as amended. See Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1381 (D.C. Cir. 1977).

799. Chrysler Corp. v. Schlesinger, 412 F. Supp. 171 (D. Del. 1976).

800. Id., at 174-177.

801. Id., at 177.

802. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1191 (3d Cir. 1977).

803. 5 U.S.C. § 706 (1976).

804. 401 U.S. 402, 415 (1971).

805. Chrysler Corp. v. Schlesinger, 565 F.2d at 1191. The Third Circuit also noted that if the Declaratory Judgment Act, 28 U.S.C. § 2201, provided authority for de novo review, as argued by Chrysler Corporation, then virtually every agency review case would warrant de novo review, and an APA review of the agency record would be eliminated. Id. The Supreme Court did not address the issue.

806. See Clement, supra note 203, at 629 and Campbell, supra note 672, at 137.

807. Id.

808. See Camp v. Pitts, 411 U.S. 138, 143 (1973), in which the Comptroller of the Currency denied a license to operate a branch bank. The Comptroller had employed a short letter of rejection and the Supreme Court declared that if the letter was inadequate the remedy was not a de novo review but a remand to the Comptroller so that the explanation for rejection could be expanded upon.

809. Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979).

810. Id., at 1726.
811. The court noted the similarity in language between exemption four and the Trade Secrets Act. Id., at 1726 n.49.
812. H.R. REP. NO. 95-1382, supra note 34, at 63.
813. 5 U.S.C. § 552(a)(4)(B) (1976).
814. See, e.g., one of the early reverse-FOIA cases, Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 943 n.10 (D.C. Cir. 1975).
815. 5 U.S.C. § 552(a)(4)(B) (1976).
816. P.L. No. 93-502, § 1(b)(2), amending 5 U.S.C. § 552(a)(4)(B) (1976).
817. See Vaughn v. Rosen, 484 F.2d 820, 827 n.21 (D.C. Cir. 1973) and Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 313 (S.D.N.Y. 1976).
818. Id., at 827.
819. See, e.g., Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); Goland & Skidmore v. CIA, No. 76-1800 (D.C. Cir. May 23, 1978); Weismann v. CIA, 565 F.2d 692 (D.C. Cir. 1977).
820. Id., at 1195.
821. 5 U.S.C. § 552(a)(4)(B) (1976).
822. 5 U.S.C. § 706 (1976).
823. 5 U.S.C. § 552(a)(4)(E) (1976).
824. 5 U.S.C. § 552(a)(4)(F) (1976).
825. See text at supra note 487.
826. 5 U.S.C. § 552(a)(4)(F) (1976).
827. 5 U.S.C. § 552(a)(4)(G) (1976).
828. 5 U.S.C. § 552(a)(4)(E) (1976).
829. S. REP. NO. 854, 93d Cong., 2d Sess. 19 (1974).
830. H.R. REP. NO. 1380, 93d Cong., 2d Sess 9 (1974) (conference report).
831. S. REP. NO. 854, supra note 829, at 19.
832. 452 F. Supp. 306 (N.D. Tex. 1978).
833. Id., at 326.
834. Shermco Industries, Inc. v. Air Force, No. 78-2499, (5th Cir. Mar. 19, 1980), reprinted in 826 FED. CONT. REP., Apr. 7, 1980, at E-4.

835. See also *Grooms v. Snyder*, 474 F. Supp. 380, 383 (N.D. Ind. 1979).
836. 5 U.S.C. § 552(a)(4)(E) (1976).
837. Id.
838. See, generally, *Campbell*, supra note 672, at 192-95, 203-204.
839. Statement reprinted in 3 HEARINGS BEFORE SUBCOMM. OF THE SENATE JUDICIARY COMM. AND SUBCOM. OF THE SENATE COMM. ON GOV'T OPERATIONS, 93d Cong., 1st Sess. 373 (1973), quoted in J. O'REILLY, supra note 1, at 4-1 n.1.
840. *Patten & Weinstein*, supra note 376, at 193.
841. *Cohen*, Openness Works--Let's Get On With It, 38 FED. B.J. 99, 100 (1979).
842. *Mecham*, *The Daily Press*, Utica, New York, at 4, Aug. 20, 1980 (reporting testimony before the Senate Intergovernmental Relations Subcommittee).
843. Id.
844. Senator Robert Dole (R-Kansas) introduced in the 96th Congress S. 2397, the "Preservation of Confidential Information Act," which would make exemption four mandatory unless the submitter consented to disclosure or the agency demonstrated an overwhelming public interest in disclosure. 864 FED. CONT. REP., Jan. 12, 1981, at K-13. Senator Dole is seeking co-sponsors to re-introduce the bill in the current Congress. Hearings on the Dole bill are tentatively scheduled for the summer of 1981.
- The chairman of the Government Operations Committee subcommittee on Government Information and Individual Rights, Representative Glenn English (D-Oklahoma), has introduced a bill (H.R. 2021) which provides for notice to submitters when a FOIA request is received, an opportunity for submitters to comment, and the right for submitters to make an agency appeal. The English bill is similar to a bill introduced in the last Congress (H.R. 5861) which stemmed from his committee's authoritative report on business data (H.R. REP. NO. 95-1382, supra note 34.) 871 FED. CONT. REP., Mar. 2, 1981, at C1 (Journal Section).
845. See text at supra notes 723-43.
846. *Halperin*, The Freedom of Information Act: How to Find Out More and Pay Less, 34 BUS. LAW. 1041, 1043 (1978).
847. See text at supra note 387.
848. *Montgomery, Peters, & Weinberg*, The Freedom of Information Act: Strategic Opportunities and Threats, 19 SLOAN MGT. REV. 1, 9 (1978).

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